SUPREME COURT, U. S.
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Supreme Court Of The United States

October Term, 1973
No. 74-1

JOHN A. CARDIN - - - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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Supreme Court Of The United States

October Term, 1973
No.

JOHN A. CARDIN *Petitioner*

versus

COMMONWEALTH OF KENTUCKY *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The Petitioner, John A. Cardin, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky affirming the conviction of the Petitioner in the Hardin Circuit Court at Elizabethtown, Kentucky.

OPINIONS BELOW

The Trial Court rendered no written opinion in this case. The opinion of the Court of Appeals of Kentucky was a memorandum opinion, not to be cited as authority, which will not be reported. It is printed in the Appendix to this petition at pages 1a-2a. The mandate of the Court of Appeals of Kentucky denying the Petitioner's motion for rehearing appears in the Appendix at page 3a.

JURISDICTION

The judgment of the Court of Appeals of Kentucky was entered on February 15, 1974. A timely petition for rehearing was denied on April 26, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. Whether The Petitioner Was Denied His Fourteenth Amendment Right Of Due Process of Law Because He Was Convicted Of A Crime In The Absence Of Evidence Proving One Of The Essential Elements Of The Offense?

II. Whether The Petitioner Was Denied His Fourteenth Amendment Right Of Due Process Of Law Where The Trial Judge Failed To Give Instructions Limiting The Purpose For Which Evidence Of Other Crimes Should Be Used?

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, John A. Cardin, resides on a farm on the edge of Sonora, Kentucky, in Hardin County. In addition to owning and operating three farms and conducting a crop spraying business, he is the owner and operator of the Sonora Garage. As a result of an investigation of stolen property conducted by Detective Richard McQuown of the Kentucky State Police, the Hardin County Grand Jury returned an indictment in January, 1971 against the Petitioner, charging him with seven counts of knowingly receiving stolen property and one count of arson.

Detective McQuown's investigation was centered primarily on four days, the 10th, 11th, 12th and 14th of December, 1970. On Thursday, December 10, 1970, the detective, in connection with other investigations, traveled to the Sonora area and while there obtained a search warrant for a barn located on the Cardin residence (referred to at trial as farm number one). The barn was later determined at trial to have been leased at that time to an individual known as Edward T. Jarrett. At about 7 o'clock in the evening, McQuown drove to the Cardin farm where he searched the barn and discovered tobacco identified as belonging to Albert Parsley of Edmondson County, Kentucky. The Petitioner was summoned to the barn, and according to McQuown's testimony, stated that the tobacco did not belong to him. No arrest was made at that time.

McQuown testified that the following day, December the 11th, at about 8 o'clock in the morning, he went to Edlin's Machine Shop in Elizabethtown, Kentucky, after receiving a telephone call. On arriving there he

found a 1970 Chevrolet truck without a bed. He identified the truck as being an E-Z Haul rental truck belonging to National Car Rental. In examining the cab of the truck, the detective found a packet containing a lease agreement which had been executed between the owner and an individual named James H. Steele. McQuown then drove to a local airport and obtained a pilot to fly him over the Cardin farms.

While conducting his aerial surveillance, he sighted a portion of the body of a 1965 Chevrolet truck and a portion of the bed of the 1970 Chevrolet truck found that morning at Edlin's Machine Shop. The truck, owned by Alton Miller of the Yellow Cab U-Drive-It Company in Bowling Green, Kentucky, was found on the second farm in the midst of junked vehicles. The bed was discovered on the third farm. The truck and bed were then removed to the Irwin and Miller Garage.

On December the 12th, McQuown went to the Cardin residence after receiving a call from a person who he refused to identify at the trial. He testified that when he arrived he found that a fire was in progress. On investigating the fire, he discovered that a portion of the truck bed belonging to the previously discovered 1965 Chevrolet truck was burning.

During the trial Detective McQuown testified that after recognizing the truck bed he placed Mr. Cardin under arrest and advised him of his rights. According to McQuown, he and the Petitioner then engaged in a lengthy private conversation concerning the stolen property which had been discovered. He related during his testimony at trial that Cardin admitted knowing that the trucks and tobacco were stolen. In addition, he

testified that the Petitioner informed him that there were a number of stolen cattle grazing in a nearby field and additional stolen tobacco in a warehouse in Greensburg, Kentucky, and that Mr. Cardin promised to take him to the other tobacco on the following Monday. Following the conversation with Cardin, McQuown took him to a State Police Post where the Petitioner was fingerprinted, photographed and otherwise processed. He was then released.

During the trial, the Petitioner also testified as to what occurred at his residence on December 12, 1970. He stated that during the conversation with McQuown he never admitted having any knowledge of the stolen nature of the trucks, tobacco or cattle. He did agree, however, that he promised to take the detective to Greensburg and in fact on Monday they did travel to the warehouse located there. However, he explained that the tobacco in Greensburg had been moved by him from the barn leased to Edward T. Jarrett at Mr. Jarrett's phone request. He further stated that he had no idea that the tobacco was stolen until McQuown searched the barn on December the 10th and found Mr. Parsley's tobacco. In order to have time to locate Jarrett and ascertain from him what was going on, he asked the detective to put off going to Greensburg until Monday.

Mr. Cardin also testified that the 1970 truck found at Edlin's Machine Shop was driven there by him for the purpose of having the bed lengthened for a customer known to him as James Steele. Mr. Steele had been trading with Mr. Cardin for a number of months, and according to the Petitioner, would go to his stock of junked vehicles on one of the Cardin farms and himself

remove the parts that he wished to purchase. While the Petitioner never stated that Mr. Steele may have had anything to do with the 1965 Chevrolet truck belonging to Alton Miller, he did point out that his fence was reported to him as being down on the farm where the junked vehicles were kept. And, on going to the site, he found mud on the fence and tire marks leading in the direction of those vehicles.

Finally, Mr. Cardin admitted that on his way to work one morning he noticed strange cattle in one of his fields. However, he testified that he just assumed that they belonged to a neighboring farmer. As that farmer stated at trial, it was not unusual for his cattle to break through the fence and wander onto the Cardin farm.

Although Detective McQuown discovered the trucks, tobacco and cattle during his four-day investigation, he did not prefer charges against the Petitioner during that time. A warrant was not issued for Mr. Cardin's arrest until some time after December 14, 1970.

The Petitioner, at a formal arraignment on January 15, 1971 in the Hardin Circuit Court, entered pleas of not guilty to all of the charges in the indictment. Following a motion by defense counsel requesting that the offenses be tried separately and an order by the trial court that the Commonwealth of Kentucky designate which of the offenses it would elect to try, the Commonwealth elected to try the Petitioner on counts 1, 2, 3 and 4 of the indictment, namely four counts of knowingly receiving stolen property. Subsequently, the Petitioner was tried on the charges of knowingly receiving the following stolen property: a 1965 Chevrolet truck; a 1970 Chevrolet truck; 24 head of Holstein cattle; and tobacco belonging to an individual named

Albert Parsley. The trial began on June 26, 1972, and continued for four days. The jury returned a verdict finding the Petitioner guilty on all four counts and fixed his punishment at one year for each count. A motion for a new trial and judgment notwithstanding the verdict was timely filed, detailing the grounds upon which the court should have set aside the verdict. After a hearing, the court overruled the motion and on April 18, 1973, sentenced the Petitioner to serve a period of one year on each of the four counts of the indictment, the sentences to be served consecutively in the state penitentiary. The state appeal followed.

The case was conducted at the trial level by J. T. Hatcher, Elizabethtown, Kentucky, attorney for Petitioner, and by Hobson L. James, Elizabethtown, Kentucky, attorney for the Commonwealth of Kentucky.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION OF WHETHER THE CONVICTION OF A CRIMINAL DEFENDANT IN THE ABSENCE OF EVIDENCE PROVING ONE OF THE ESSENTIAL ELEMENTS OF A CRIME IS A VIOLATION OF DUE PROCESS OF LAW, THE RESOLUTION OF WHICH IS IN CONFLICT AMONG THE VARIOUS FEDERAL AND STATE JURISDICTIONS.

The Petitioner was convicted at trial on four counts of knowingly receiving stolen property, including a 1970 Chevrolet truck, in violation of KRS 433.290.[1] Following the close of the case for the Commonwealth of Kentucky, defense counsel moved for a directed verdict, stating as his grounds that the prosecution had failed to prove all of the essential elements of the offenses being tried (Appendix 46a-47a). The trial judge overruled the motion. After completing the case for the defense, Petitioner's counsel renewed his motion for a directed verdict and, again, the trial court overruled it (Appendix 49a). On appeal, both in his brief and petition for rehearing, Petitioner urged the Kentucky Court of Appeals to reverse his conviction as to the 1970 truck and direct that a verdict of acquittal be entered on that count of the indictment. He argued that the Com-

[1] KRS 433.290 [1199] Receiving stolen property.
Any person who receives any stolen property, the stealing of which is punishable as a crime, knowing it to be stolen shall be liable to the same punishment as the person stealing it. Any person who violates this section may be convicted, although the principal offender has not been convicted. The possession by any person of any stolen property shall be prima facie evidence of his guilt under this section.

monwealth had failed to prove that the truck had been stolen. However, the Court of Appeals affirmed the conviction, stating in its memorandum opinion that the Court felt that the evidence presented at trial that the 1970 Chevrolet truck had been altered was sufficient proof of the truck having been stolen (Appendix 1a-2a). Petitioner feels that such a conclusion is erroneous

It is the law in Kentucky that the Commonwealth must adequately prove that goods are stolen if it is to be found in compliance with proving the essential elements of knowingly receiving stolen property. *Grider* v. *Commonwealth,* Ky., 479 S.W. 2d 11 (1972). And, in *Ellison* v. *Commonwealth,* 190 Ky. 305, 227 S.W. 458 (1921), the Court of Appeals, in reciting the elements of that offense, defined stolen property as property which has been the subject of a larceny:

> "To constitute the crime of knowingly receiving stolen property, under section 1199, Ky. Stats., the property received must theretofore have been the *subject of a larceny* perpetrated by one, other than the party accused of having feloniously received it; the reception must have been with knowledge of the recipient that the property had been stolen; and the reception must have been accompanied with the intention to deprive the owner of it." (Emphasis added.)

However, the Commonwealth, in the instant case, failed to prove that a larceny had occurred as to the 1970 truck and, at most, presented only evidence as to an unlawful conversion. As noted in *Clark* v. *Commonwealth,* Ky., 386 S.W. 2d 458 (1965), "larceny" and "conversion" are distinct offenses.

The Court of Appeals in *Rice* v. *Commonwealth*, Ky., 300 S.W. 2d 238 (1957), a case cited often in Kentucky for its definition of larceny, stated:

> "Generally speaking, and in the absence of statutory modifications, it is essential to every larceny that there be a simultaneous combination of an unlawful taking, and asportation, and a felonious intent. See 32 Am. Jur., Larceny, Section 10; Roberson's Ky. Cr. Law, Sections 806 and 807. Furthermore, this Court has held that if the owner of property (or his agent) is induced to part with the mere possession of his property by trick or fraud, the taker at the time having an intention to wrongfully appropriate the property to his own use, the taking by such means is larceny. Hudspeth v. Commonwealth, 195 Ky. 4, 241 S.W. 71; Trotter v. Commonwealth, 169 Ky. 551. 184 S.W. 871. L.R.A. 1916E, 768; Roberson's Ky. Cr. Law, Section 821."

From *Rice*, we learn that generally a larceny requires the simultaneous combination of an unlawful taking and a felonious intent. The evidence as to larceny in the instant case does not fit this definition because there was no unlawful taking. Rather, the testimony of A. O. Bingenheimer, an employee of the owner of the truck, National Car Rental, is absolute on the fact that the truck was properly leased to an individual known as James Steele, and thus Mr. Steele came into possession of it lawfully. Mr. Bingenheimer testified concerning the lease agreement (Exhibit 20) as follows (Appendix 37a-38a):

> Q55 Now, I take it you have no personal knowledge of having rented this truck or leased it out to this man, Steel, do you?

A No, sir.
Q56 All you have to go on is the record which has been filed here, and some testimony which was found in the cab of the truck?
A That is correct.
Q57 And whatever agreement there was between Steel and the car company you work for, all you know about it is what is embodied in that contract, is that right?
A Yes, sir.
Q58 You don't have any knowledge of any agreement or understanding with Steel except what's in that contract?
A None, sir.
Q59 And according to that contract, the truck was leased out on December the 5th, 1970, and is there anything in that contract stating when that truck was to be returned?
A I don't see it in this particular one.
Q60 So if that truck was delivered to Steel on that date pursuant to that agreement, Steel rightfully had possession of it at that time, didn't he?
A That's correct, sir.

Both the fact that the truck was leased to Steele on December 5, 1970, with no return date specified in the agreement and the fact that Detective McQuown discovered the truck on December 11, 1970, indicate that the truck was not stolen. At least such proof, keeping in mind that no evidence was offered that National Car Rental ever reported to the authorities the truck as missing, did not establish that the truck was the subject of a larceny.

The opinion in *Rice*, supra, also noted that an exception to the requirement of proving an unlawful taking

exists in which a larceny may be proved even though the element of unlawful taking is not present. This is a situation, as in the present case, where the person coming into possession of property acquires such property lawfully. However, as the court stated in *Rice*, in order to have a larceny, the owner of the property, or his agent, must be induced to part with possession of the property by trick or fraud, and the taker at the time of receiving the goods must have an intention to wrongfully appropriate the property to his own use. This rule of law was also previously stated, and perhaps worded in a somewhat clearer fashion, in *Fugate* v. *Commonwealth*, 308 Ky. 815, 215 S.W. 2d 1004 (1948):

> ". . . a person who is lawfully in possession of an article cannot be guilty of a larceny unless at the time it was placed in possession the intent to steal was in the mind of the person."

As illustrated by example in Roberson's New Kentucky Criminal Law and Procedure, Section 821 (2d ed. 1927), a person would be guilty of a larceny, where he " . . .obtains possession of a horse with the consent of the owner, by falsely and fraudulently pretending that he wants to use him a short time for a temporary purpose, and will return him at a specified time, when in fact he intends and does wholly deprive the owner of the horse, and appropriates him to his own use . . ."

The Petitioner sincerely believes that for the Kentucky Court of Appeals to have concluded that the Commonwealth proved that the truck was stolen, i.e., the elements of a larceny, it was necessary for the court to determine whether evidence was presented that the lessee of the truck had the felonious intent, at the time

of taking lawful possession, to wrongfully appropriate the property to his own use. We full well realize that ordinarily felonious intent in a case alleging larceny is a question to be determined by the jury. Roberson's New Kentucky Criminal Law and Procedure, Section 842 (2nd ed. 1927). However, there are exceptions to such a rule where the evidence presented goes to the question of intent and shows that no felonious intent to wrongfully appropriate existed at the time of the taking of the property. *Hudspeth* v. *Commonwealth,* 195 Ky. 4, 241 S.W. 71 (1922). The Petitioner submits that the instant case is just such an exception and that the trial court should have directed the jury to find for the defendant on Count No. 2 of the Indictment as the evidence did not support a finding that the lessee of the 1970 truck had the required felonious intent at the time of taking possession of the property.

The Commonwealth introduced evidence via Detective McQuown's testimony that the 1970 truck was altered for the purpose of lengthening the truck so that it might accommodate a long bed. According to McQuown's testimony, the Petitioner had stated to him that a longer bed was taken off the 1965 truck with the intention being that it would be placed on the 1970 truck. McQuown testified that Cardin stated the 1965 truck had been breaking down and a more reliable truck had been needed for hauling the stolen property (Appendix 31a):

Q 149 What vehicle was it?

A They had put that black wooden cattle bed, flat, on the Alton Miller 1965 Chevrolet truck which was in the telephoto

> lens photo, and then they'd removed that bed from it and they were going to take that bed because that truck was breaking down all the time on these trips these fellows in it was involved in; it wasn't good enough for them so they wanted a good truck, and so that's why they were going to put the bed on the 1970 new Chevrolet E-Z-Haul truck, and that's why the frame was being lengthened.

The need for a more reliable truck was the only substantial reason provided by the Commonwealth for the alteration of the truck. That being the case, it was then necessary, in order to prove that the truck was acquired by Steele with a felonious intent to convert the truck at the time of receiving possession, that the Commonwealth present evidence that the 1965 truck was acquired prior to the rental of the 1970 truck.

Mr. Bingenheimer testified that the 1970 truck was leased on December 5, 1970. No evidence was presented at trial as to the exact date that the 1965 truck was stolen nor as to the date that it was leased from Alton Miller. Eugene Miller testified only that it was leased either in November or early December (Appendix 42a). Although an agreement covering the 1965 truck was referred to at trial it was never introduced as an exhibit from which the rental date might have been ascertained. Without presenting evidence that the 1965 truck was acquired prior to the rental of the 1970 truck, the Commonwealth failed in showing that Steele had the felonious intent at the time of taking possession to alter or otherwise convert the truck so that it could be used in place of the 1965 truck. It is just as likely that the inten-

tion to alter the truck developed sometime after he came into possession. Certainly a determination as to when Steele leased the 1965 truck and in turn a determination as to whether the 1970 truck had been acquired after the 1965 truck were not questions of fact to be submitted to the jury. They were matters of law to be proved at the trial by the Commonwealth. However, the Commonwealth never offered the necessary proof. Applying the rule that the felonious intent to appropriate must exist at the time of taking possession where one lawfully comes into possession of property, the Petitioner feels that the Commonwealth failed to prove an essential element of the offense of knowingly receiving stolen property, that being that the 1970 Chevrolet truck was the subject of a larceny.

We ask this Court to consider whether Petitioner's conviction of the offense of knowingly receiving the 1970 Chevrolet truck, absent proof that the truck had been the subject of a larceny, deprived him of the right of due process of law as guaranteed by the Fourteenth Amendment. The Petitioner feels that if the Petition for Writ of Certiorari is granted in this case, this Court would be afforded not only an opportunity to correct the injustice done to Petitioner below, but also to set forth a clear standard in the realm of the fair administration of criminal justice. Such a standard is in dire need of being laid down as is illustrated by the conflicting decisions in various federal and state jurisdictions regarding the question of whether an absence of evidence proving one of the elements of a crime, the crime being made up of several elements, is the same as a conviction on absolutely no evidence so as to violate due process of law

under the rule of *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960) and *Garner* v. *Louisiana*, 368 U.S. 157 (1961).

In the landmark case of *Thompson* v. *City of Louisville*, supra, this Court held that convictions which are devoid of evidentiary support are unconstitutional under the Due Process Clause of the Fourteenth Amendment:

> "Thus we find no evidence whatever in the record to support these convictions. Just as 'conviction upon a charge not made would be sheer denial of due process', so is it a violation of due process to convict and punish a man without evidence of his guilt."[2]

Petitioner realizes, as explained by this Court in *Garner* v. *Louisiana*, supra, a case following the rule of *Thompson*, that the Court will not inquire as to the sufficiency of evidence to support a state conviction, but will only consider the question of whether there is any evidence upon which the conviction might be based. However, Petitioner is not asking that a determination be made as to sufficiency of evidence in his case. Rather, he asks this Court to grant the Petition in order to consider whether the failure of the prosecution to prove the element of a larceny as to the 1970 truck, an essential element of the offense upon which he has been convicted, is a denial of due process of law and falls within the rule of the *Thompson* case.

Various courts have differed as to the interpretation which should be given to *Thompson*, supra. For exam-

[2]See also *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 15 L. Ed. 2d 176, 86 S.Ct. 211 (1965); also, *Adderley* v. *State of Florida*, 385 U.S. 39, 17 L.Ed. 2d 149, 87 S.Ct. 242, reh.den. 385 U.S. 1020, 17 L.Ed. 2d 559, 87 S.Ct. 698 (1966).

ple, the United States Court of Appeals, Fourth Circuit, in *Player* v. *Steiner*, 292 F.2d 1 (CA 4 1961), held that the failure to prove one element of a crime made up of several elements is not such a denial of due process as to bring the case within the rule of *Thompson*. However, in *DeMoss* v. *Pennsylvania*, 316 F.2d 841 (CA 3 1963), the Court of Appeals concluded that some evidence must be found to exist on *all* of the essential elements of an offense, finding that contrary to the notion of the court in *Player*, the rule of *Thompson* and *Garner*, supra, requires such in order to comply with due process of law.

This Court has indicated that for a conviction to comport with the Due Process Clause of the Fourteenth Amendment, evidence must be presented as to all of the essential elements of a crime. In *Harvey* v. *Johnson*, 391 U.S. 596 (1968), an opinion was rendered reversing the decision below, and holding that the prosecution had failed to present evidence as to the essential "ingredient" of "wandering" or "strolling" contained in the criminal statute which the defendant had been charged with violating, although evidence had been provided on the second element of "no lawful purpose or object." And, of even more importance to the Petition before this Court is the opinion in *Harris* v. *United States*, 404 U.S. 1232 (1971). In that recent case, this Court stated:

> "Applicant principally argues that there was no evidence in the record from which an inference is permissible that he knew that a truck guided by him and a co-defendant, in a separate vehicle, from one location in Los Angeles to another location in that city contained unlawfully imported narcotics.

It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged would violate due process. See Adderley v Florida, 385 US 39, 44, 17 L Ed 2d 149, 154, 87 S Ct 242 (1966). See also Johnson v Florida, 391 US 596, 20 L Ed 2d 838, 88 S Ct 1713 (1968); Thompson v Louisville, 362 US 199, 4 L Ed 2d 654, 80 S Ct 624, 80 ALR2d 1355 (1960)."[3] *(Emphasis added.)*

We, therefore, respectfully ask this Court to grant the Petition for Writ of Certiorari in order to reaffirm the principle of *Harris* v. *United States*, and declare that the Due Process Clause of the Fourteenth Amendment will not tolerate convictions where relevant evidence as to any essential element of an offense charged is absent.

II. THE ADMISSION INTO EVIDENCE OF OTHER CRIMES WITHOUT AN INSTRUCTION TO THE JURY BY THE TRIAL JUDGE LIMITING THE PURPOSE FOR WHICH SUCH ARE INTRODUCED PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION CONCERNING A CRIMINAL DEFENDANT'S FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL.

At the trial of this case, Detective McQuown, on direct examination, and without being asked by the prosecutor, volunteered to the jury very damaging and prejudicial testimony. This testimony consisted of evidence concerning other offenses, arson and knowingly receiving stolen tobacco belonging to persons other than

[3] See also, *United States* v. *Ramirez*, 482 F.2d 807, 814 (CA2 1973), which held that the defendant's conviction for the violation of 18 U.S.C.A. §924(c)(2) could not stand where the prosecution introduced only evidence that defendant carried a firearm during the commission of a felony and failed to provide proof that he possessed it unlawfully.

Albert Parsley, which the Petitioner had been indicted upon, but which the Commonwealth of Kentucky had elected not to try. The testimony of McQuown was as follows (Appendix 4a-5a):

Q31 Now, Detective McQuown, will you tell us about the cattle?

A I have additional information on the tobacco; I'll cover that and then I'll move on to the cattle.

Q32 All right. Go ahead.

A This was on December the 10th, at 7:00 p.m. when the tobacco was recovered. The investigation centered on three days, primarily, the 10th, 11th, and 12th of December, 1970. On the 12th of December, 1970, I went to the John A. Cardin farm again, to the same house; he owns three farms but this is where his residence is located as well as where the tobacco was located. I went to his farm, and at the time there was a fire in progress behind another barn located beside his house; and he was arrested after a short investigation there, and during the arrest he was advised of his rights; and this was two days later after we recovered the tobacco from the barn. At this time, he admitted to me that the tobacco in the barn—he knew who brought it there, he knew it was stolen, and that it was part of other tobacco that was in the barn also, and that he knew where the tobacco came from.

Following McQuown's testimony as to "arson" and "other tobacco", the court and counsel retired to chambers where defense counsel moved the court to discharge the jury and declare a mistrial because of the prejudicial testimony. As the testimony had been

volunteered and was not a result of specific questions asked by the Commonwealth, defense counsel had no opportunity to object prior to its presentation to the jury. Following discussion, the trial court overruled the motion (Appendix 7a).

Detective McQuown was then called into chambers where he was examined out of the hearing of the jury. Defense counsel, on eliciting testimony from McQuown during this time, discovered that the detective's reference to an arrest in his testimony which was the subject of the mistrial motion was the arrest of the Petitioner for the crime of arson. Counsel for the Petitioner added the evidence of arrest for arson volunteered by McQuown as a ground in his motion. The entire motion for declaring a mistrial was then overruled. However, the trial judge did admonish the witness not to volunteer information but to answer the questions asked by the Commonwealth (Appendix 21a).

On returning to open court, Detective McQuown continued his testimony on direct examination. Once more, in complete defiance to the court's admonition, the witness volunteered to the jury evidence of the arson charge in stating that a truck bed was burning when he arrived at the Petitioner's farm (Appendix 24a):

Q44 Was the bed as it was when it was on the truck?

A No, it had been cut up and partially destroyed, and when I arrived at the farm it was on fire.

Q45 You say the bed was on fire; was that the entire bed?

A The bed consists of the wooden floor and the

> metal frame around it, and then the walls and the roof and the doors and the front portion of the bed had been cut away and they were gone, they weren't even there. The only portion remaining was if it were a flat bed truck that had the walls cut off of it on each side; and it was off of the truck and it was laying on the ground.

Defense counsel then objected to the above testimony concerning the burning of the truck bed as evidence of the arson offense not being tried, and again moved to discharge the jury. And, after doing an about face and holding that the evidence was admissible, the court overruled counsel's motion for the third time.

If Detective McQuown's testimony above did not constitute evidence of other crimes, his later testimony on direct examination certainly did when he related to the jury that after recognizing the burning truck bed he arrested Mr. Cardin (Appendix 27a):

> Q 129 Now, on that occasion and at that place, what occurred? What did you do?
>
> A *Well, after observing the truck bed—John A. Cardin was there with me—I immediately recognized the truck bed, and I placed him under arrest and advised him of his rights.* (Emphasis added)

Although defense counsel had already moved for a mistrial on three other occasions and been overruled, he again renewed his motion for a mistrial following the above testimony by Detective McQuown (Appendix 47a-48a). Once more, the court refused to declare a mistrial and discharge the jury. After all of the objections and motions by defense counsel, the court did not even

relate to the jury that they could only consider the testimony concerning arson and tobacco not belonging to Albert Parsley as indicating such things as intent, motive, guilty knowledge or common scheme or plan on the part of the defendant. And certainly, even if the trial court felt that the evidence of arson was competent as to the charge concerning the 1965 Chevrolet truck, the court was required to at least admonish the jury that they should consider it only for the purpose of showing intent, etc., to knowingly receive that particular truck. The evidence as to arson was in no way competent as to the other three charges being tried.

The Petitioner raised the issue of other crimes on taking an appeal to the Kentucky Court of Appeals and argued the question extensively both in his brief and petition for rehearing. It was his contention that the trial court should have at least admonished the jury the limited purpose for which the evidence as to arson and other tobacco was introduced so as to negate a prejudicial effect as to Petitioner. However, the Court of Appeals in its opinion below failed to mention or even allude to the issue (Appendix 1a-2a), although the law in Kentucky seems to be that the trial court has a duty to give a limiting instruction when evidence of other crimes is introduced.

In referring to evidence of other unlawful receipts of property, the Kentucky Court of Appeals in *Ball* v. *Commonwealth*, 278 Ky. 52, 128 S.W.2d 176 (1939), stated:

> "When such evidence is admitted for the purpose of proving intent, etc., as above pointed out, it becomes the duty of the court to admonish the jury

> the purpose for which all other proven receipts were admitted."

And, in the recent Kentucky case of *Grider* v. *Commonwealth,* Ky., 479 S.W.2d 11 (1972), the Court of Appeals also stated that an admonition by the trial court was required:

> "It is our conclusion that in the next trial evidence of other items in possession of Grider will be admissible, with proper admonition, provided they are adequately shown to have been stolen."

Petitioner does not ask this Court to grant the Petition for the purpose of considering rules of evidence, for he believes that where possible each state jurisdiction should be allowed to promulgate such rules as it sees fit. Rather, he requests consideration of his case in order that this Court be afforded an opportunity to lay down guidelines which will promote the fair and equitable administration of criminal justice by requiring substantive due process which is in compliance with the Fourteenth Amendment. Petitioner sincerely believes that clarification as to the necessity of limiting instructions when other offenses are introduced into evidence is in dire need of being provided in light of conflicting decisions among the various federal and state jurisdictions, and that the Due Process Clause requires that the trial courts of this country make every possible attempt to see that a criminal defendant is convicted as a result of the introduction of relevant evidence as to those crimes upon which he is tried and not because of other crimes introduced for limited purposes.

Numerous federal cases have considered the question of whether a limiting instruction is required and

whether it is necessary that it follow the introduction of other crimes or is sufficient if it comes in the general charge to the jury. In *Montgomery* v. *United States*, 203 F.2d 887 (CA 5 1953), the United States Court of Appeals held that some type of cautionary instruction was required:

> "We think, however, that the jury should have been cautioned that the evidence was admitted only for the light that it might throw on the federal offenses on trial, and that no inference of guilt could be drawn merely from the commission of other offenses different in character. In short, the jury should not convict the defendant of income tax evasion because they concluded that he was a grafter. See Railton v. United States, 5 Cir., 127 F.2d 691; Lurding v. United States, 6 Cir., 179 F.2d 419."

And, the Court of Appeals, District of Columbia, in two recent cases, has also held that limiting instructions are necessary to protect the interests of a defendant when other crimes are introduced. In *United States* v. *Bussey*, 432 F.2d 1330 (CA DC 1970), the Court held that a limiting instruction should have been given at the time of admission of details of a prior offense, while under the facts of *United States* v. *Fench*, 470 F.2d 1234 (CA DC 1972), the Court decided that a cautionary instruction during the general charge to the jury was sufficient.

Finally, the Supreme Court of the United States has on occasion intimated that limiting instructions are necessary. In its opinion in *Williamson* v. *United States*, 207 U.S. 278 (1908), the Court stated:

> "The contention that the proof on the subjects just stated should not have been admitted, because

> it tended to show the commission of crimes other than those charged in the indictment, and consequently must have operated to prejudice the accused, is, we think, without merit, particularly as the trial judge, in his charge to the jury, carefully limited the application of the testimony so as to prevent any improper use thereof."

In *Spencer* v. *Texas*, 385 U.S. 554 (1967), this Court has also indicated that limiting instructions should be given in order to comply with the Due Process Clause of the Fourteenth Amendment so as to negate any prejudicial effect which the introduction of other convictions or crimes might have on a criminal defendant's case.

We, therefore, respectfully ask this Court to grant the Petition for Writ of Certiorari in order to consider the question of whether the Petitioner was deprived of his right to due process of law where evidence as to other offenses was introduced and *no limiting instructions whatsoever* were given to the jury by the trial court.

CONCLUSION

The Petitioner's Fourteenth Amendment right to Due Process of Law was violated when his conviction of Knowingly Receiving a stolen 1970 Chevrolet truck was allowed to stand despite the failure of the prosecution to prove that the truck had been the subject of a larceny. We respectfully submit that the Court should grant the Petition because the decision below presents a substantial Constitutional question of whether the conviction of a criminal defendant in the absence of evidence proving one of the essential elements of a crime is a violation of due process of law, the resolution of which is in conflict

among the various federal and state jurisdictions.

The Petitioner was also denied his constitutional right of due process of law because the trial judge failed to give instructions to the jury limiting the purpose for which evidence of arson and other stolen tobacco should be used. We respectfully submit that the Court should grant the Petition because the admission into evidence of other crimes without an instruction to the jury by the trial judge limiting the purpose for which such were introduced presents a substantial Constitutional question concerning a criminal defendant's Fourteenth Amendment due process right to a fair trial.

Respectfully submitted,

FRANK E. HADDAD, JR.
Counsel for Petitioner

Rendered: February 15, 1974

COURT OF APPEALS OF KENTUCKY
File No. 73-723

JOHN A. CARDIN APPELLANT

V.

COMMONWEALTH OF KENTUCKY APPELLEE

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE J. HOWARD HOLBERT, JUDGE
Indictment Nos. 71-46 & 71-79

MEMORANDUM OPINION OF THE COURT BY JUSTICE STEPHENSON

Affirming
(Not to be cited as authority)

A Hardin Circuit Court jury convicted John A. Cardin on four counts of knowingly receiving stolen property. KRS 433.290. Cardin appeals asserting error in the denial of a motion for separate trials. He also contends that the Commonwealth failed to prove one of the items had been stolen. We affirm.

The stolen items were all found on property owned by Cardin or in his possession. All the offenses occurred within a relatively short period of time.

The granting or denying of a motion for separate trial, RCr 9.16, is discretionary with the trial court. There is no positive showing of a clear abuse of discretion and prejudice to Cardin's defense in the denial of the motion for separate trials. Russell v. Commonwealth, Ky., 482 S.W.2d 584 (1972).

A rental truck, the item Cardin claims the Commonwealth failed to prove had been stolen, was identified by the owners at a garage where Cardin had taken

the truck to have the chassis lengthened by five feet. The bed had been removed, and Cardin had placed license plates from an older truck belonging to him on the rental truck. The Oregon and Wisconsin license plates, which had been on the rental truck, were found on the floor of the cab. The truck had been rented a few days previously by a Mr. Steele who could not be found at the time of the trial. While the rental company may not have been aware that the truck had, in fact, been stolen, the jury could infer from all the evidence that such was the case. They did so, and the evidence supports the verdict.

The judgment is affirmed.

Osborne, C. J., and Jones, Milliken, Reed, Palmore, Steinfeld, and Stephenson, JJ., sitting. All concur.

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APPELLANT'S PETITION FOR REHEARING DENIED — April 26, 1974

MANDATE

THE COMMONWEALTH OF KENTUCKY
THE COURT OF APPEALS
74 Term—February 15, 1974

JOHN A. CARDIN

vs.

COMMONWEALTH OF KENTUCKY

FILE NO. 73-723

APPEAL FROM A JUDGMENT OF THE
HARDIN CIRCUIT COURT
IND. NOS. 71-46 & 71-79

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

/s/ Frances Jones Mills
Frances Jones Mills, C.C.A.

A copy—Attest:
Issued April 26, 1974

Testimony of Detective Richard McQuown

TRANSCRIPT OF EVIDENCE

Elizabethtown, Kentucky
June 27, 28 & 29, 1972

APPEARANCES

For Commonwealth: Mr. H. L. James
Commonwealth Attorney
Elizabethtown, Kentucky

For Defendant: John A. Cardin, present
and represented by counsel:
Mr. J. Turner Hatcher
Elizabethtown, Kentucky

VOLUME I

June 27, 1972

PORTIONS OF DETECTIVE RICHARD McQUOWN'S TESTIMONY AND DEFENDANT'S MOTIONS TO DECLARE A MISTRIAL

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THE TRIAL OF THE CASE BEFORE THE JURY CONTINUED AS FOLLOWS:

Q 26 Detective McQuown, do you know where John A. Cardin lives?

A Yes, I do.

Q 27 How long have you known Mr. Cardin?

A Since the middle of 1970. I met him personally in October, 1970.

Q 28 Has he ever himself told you who owns the property where he lives?

A Yes, he owns it.

Q 29 Has he told you that?

A Yes, he did.

Q 30 Now, was he present when the tobacco was found?

A Yes, he was.

Q 31 Now, Detective McQuown, will you tell us about the cattle?

A I have additional information on the tobacco; I'll cover that and then I'll move on to the cattle.

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Q 32 All right. Go ahead.

A This was on December the 10th, at 7:00 p.m. when the tobacco was recovered. The investigation centered on three days, primarily, the 10th, 11th, and 12th of December, 1970. On the 12th of December, 1970, I went to the John A. Cardin farm again, to the same house; he owns three farms but this is where his residence is located as well as where the tobacco was located. I went to his farm, and at the time there was a fire in progress behind another barn located beside his house; and he was arrested after a short investigation there, and during the arrest he was advised of his rights; and this was two days later after we recovered the tobacco from the barn. At this time, he admitted to me that the tobacco in the barn—he knew who brought it there, he knew it was stolen, and that it was part of other tobacco that was in the barn also, and that he knew where the tobacco came from.

Q 33 Now, you say you advised him of his rights; what rights did you advise him of?

THE COURT: Let me see the attorneys just a minutes, please.

COURT AND COUNSEL CONFERRED IN THE PRESENCE OF BUT OUT OF THE HEARING OF THE

JURY. THE COURT THEN ADDRESSED THE JURY AS FOLLOWS:

THE COURT: Ladies and gentlemen, we will be out for a few minutes. You may be in recess during that period of time. I'll have Mr. Hugo call you when we return. Remember and observe the admonition heretofore given you.

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WHEREUPON COURT AND COUNSEL, DEFENDANT, AND THE WITNESS McQUOWN RETIRED TO CHAMBERS WHERE THE FOLLOWING PROCEEDINGS WERE HAD:

MR. HATCHER: Your Honor, at this time the Defendant moves the Court to discharge the jury and declare a mistrial for the following reasons: The witness McQuown, without being asked by the Commonwealth Attorney, volunterred to the jury incompetent and very damaging and prejudicial testimony. His Honor has heretofore sustained the Defendant's motion for a severance of some of the counts of this indictment. One of the counts of the indictment is that of arson, and that count is not being tried at this time; nevertheless, the witness testified about that offense and facts concerning it when he referred to the fire and the burning of the truck bed on the Cardin farm which is highly prejudicial to the substantial rights of the Defendant. In addition, the witness McQuown volunteered, without any previous hearing of the Court on its competency, to testify as to a confession made to him by the Defendant Cardin; and this highly irregular activity of his and his introduction of this incompetent evidence will materially prejudice the jury against the Defendant. The Defendant is entitled at this time, in our opinion, to the declaration of a mistrial and discharge of the jury.

MR. JAMES: In opposition to the motion just made by

the Defendant, the witness McQuown did not say the other tobacco was stolen; he said there was other tobacco in the barn; the

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witness McQuown did not say that the truck bed was burned; he said he went there and that there was a fire when he got there, without saying what it was. He said that he had advised the Defendant of his rights; I then asked him what rights he gave him, and we are in here now to get to that point. There has been no evidence that was not competent or not material, and the actions in regard to the attempt to conceal the identity of the truck are certainly, or supposed, owing to the knowledge of the Defendant on these charges, and his other conduct.

THE COURT: I think it's proper for the witness to testify as to how he happened to be there, which he did; and of course, as soon as he said that Mr. Cardin had made certain—or an admission and that he advised him of his rights, that's when I called counsel to the bench and suggested that we should take it up in chambers. Part of the matters that he testified to was that Mr. Cardin told him that he owned property—that is, not property, but the premises. As I understand it, when a confession is testified to, either written or oral, that the Court must determine if it was voluntarily given and must then make findings as to whether it was or whether it wasn't, and that is done outside of the presence of the jury. Of course, that's why we are here; and as soon as I saw where we were getting, that's when I suggested we come out here. I see no prejudice at this point, so I overrule the motion.

MR. HATCHER: I wonder how much trouble it would be to go back and see just what Mr. McQuown said about stolen tobacco. I don't recall identically what he said, but I believe he

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also referred to other tobacco, and if he did, that embodies other offenses that are not being tried also. I wonder if we can check back and see just what he said about tobacco.

THE TESTIMONY OF THE WITNESS McQUOWN ON THIS MATTER WAS READ BY THE COURT REPORTER, AND THE TAPED RECORDING WAS HEARD BY COURT AND COUNSEL.

MR. HATCHER: This information volunteered by this witness was, as I say, entirely voluntary. The Commonwealth had not asked the specific questions, and for that reason the Defendant did not have an opportunity to object. That's the reason the objection did not come until after the testimony came out. In addition to the grounds heretofore set out for a motion to discharge, this witness testified about further tobacco being stolen; I believe the record will show "part of other tobacco." Now, in this indictment there are, I believe, four charges of knowingly receiving stolen tobacco. Three of those charges have been severed from this trial and they pertain to the other tobacco. So this witness has now given evidence of at least two other charges in this indictment that are not being tried now—one that pertains to the charge of arson and the other that pertains to the receiving of other stolen tobacco.

THE COURT: I understand the witness' statement was that Mr. Cardin said that he knew there was tobacco there, and then he said it was part of other tobacco but there wasn't any

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mention of it being stolen tobacco; and of course there was no objection. Let the motion be overruled.

DIRECT EXAMINATION OF WITNESS IN CHAMBERS:

MR. JAMES: Detective McQuown, on December the

12th, you visited the Cardin House and you stated that you arrested the Defendant. At that time, did you advise him of his rights and, if so, what advice did you give him?

WITNESS: I advised him he had a right to remain silent, and that anything he said could be used against him in a court of law. I told him he had a right to an attorney being present before any questioning if he desired one, and I told him that if he could not afford an attorney the Court would appoint one for him. I said did he understand those rights, and he acknowledged that he did, and then he answered the questions I asked him.

MR. JAMES: Did he ask for an attorney, or indicate that he didn't know what his rights consisted of?

WITNESS: He did not ask for an attorney and he acknowledged that he knew his rights.

MR. JAMES: Then, following that, did he make statements to you concerning the tobacco crops?

WITNESS: Yes, he did.

MR. JAMES: Did he make statements regarding other matters also at that time?

WITNESS: Yes, he did.

MR. JAMES: Were they voluntarily made by him?

WITNESS: Yes, they were.

MR. JAMES: Did you make him any promises or offer any inducements for him to give you information?

WITNESS: No, I merely explained to him that he was in an awkward situation, and how bad it looked, and what was involved.

MR. JAMES (Addressing the Court): Judge, the statements made after that are the things that involve replies to the officer's questions on matters excluded by severance. Shall we hear in chambers the statements made on that?

THE COURT: I think we will, yes.

Testimony of Detective Richard McQuown

MR. JAMES: Tell the Court what statements were then made to you by the Defendant, John A. Cardin.

WITNESS: He stated that he'd had this mess going on for some time, and during the discussion he acknowledged that Joe Mike Mouser was responsible for the thefts and he brought the property there and he was selling it, the tobacco, and he had a portion of the Parsley tobacco—a portion of the tobacco we'd recovered from the barn—in the tobacco warehouse over there; and he agreed to turn that over to me the following Monday—this was on a Saturday. And I explained to him the seriousness of the offenses, and what this meant, and how well we'd like to apprehend the persons that were responsible for the thefts of it; and that he shouldn't shoulder all the blame, because I didn't feel he was the one out stealing it—someone else was. He acknowledged that Joe Mike Mouser had brought that there, the trucks that were involved, and—

MR. JAMES (Interrupting): Now, what trucks are you referring to?

WITNESS: The E-Z Haul truck and the Alton Miller Yellow Cab truck. And how the beds had been removed, and how they had been transferred from one truck to another and for

one to be moved to another truck in order to haul more stolen property. I asked him if he would obtain an attorney and come to see you and discuss this case, and he said he would see one and see what he could do. He failed to do that.

MR. JAMES: At that time, Detective McQuown, had the cattle been found?

WITNESS: No, I asked him just before we left there, I said, "Is there anything else here on the farm that's stolen, to your knowledge, that we can clear up right now and remove to keep from having to come back later, to keep this thing going

all the way along." and he said, "Yeah, there is some cattle here." and I asked him how many, and he said, "Twenty or twenty-five," and he showed them to me, and the owner was called that had cattle missing, and he came there and identified his cattle, and they were released to him, one day later. He told me how Mouser had explained to him how the cattle were loaded and the tailgate fell out and he dropped some of—some of the cattle fell out of the truck and he had trouble with them; and he got hung up when he was stealing one crop of tobacco and had to steal a tractor to pull it out; and all this in the investigation that was made was just as he said it was. These things happened. The tailgate came out and the cattle went off on the road and were strayed and they were returned to the owner of the cattle. The tobacco crop that was stolen in—which is not involved in this case—and how it was stolen, and this was verified to have happened that way, using the theft of the tractor

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to pull the truck out of the mud. All this corroborated what he told me. He told me he'd deliver me that tobacco Monday, and he did so. He took me to Greensburg, Kentucky. He followed my car, and he drove with his wife and Finis Durrett who was here, the manager of the Greensburg Tobacco Warehouse, and part of that tobacco was also Mr. Parsley's tobacco.

MR. JAMES: Did or not Mr. Parsley receive some payment for the tobacco that was sold on the Greensburg floor?

WITNESS: Yes, he did. It was a very difficult situation to divide several crops of tobacco that were all in one bundle, and they came upon an agreement. Mr. Parsley's tobacco was identified there, and he agreed upon a certain amount of it and it was returned to him there at the warehouse, as well as to the tobacco he had picked up at the barn.

MR. JAMES: The statement that you made concerning

the Parsley tobacco—you said there was other tobacco there. Is that what you said?

WITNESS: Yes, he told me he hauled that tobacco out on a Sunday afternoon and paid a colored man by the name of Feathers six dollars to help him load it; and he told me what truck he loaded it on and it was the truck that belonged to Alton Miller containing a truck bed that I know was recovered before and it was stolen from the Irwin and Miller Company in a bad-check case; and it had turned up back there again and it was used to haul this stolen tobacco of Albert Parsley's.

I further state that he admitted all of this knowing full well of his rights.

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MR. JAMES: Was anyone present when the statements were made?

WITNESS: No, and the reason for that is because Joe Mike Mouser was in the pick-up truck owned by John Cardin with Mike Kaphammer, and Martin Eugene Alvey was under arrest at that scene and in my custody. Detective Chambers was in pursuit of Mouser and Mike Kaphammer, and they fled into the woods and were unapprehended. And then after we completed what investigation was necessary at the Cardin residence, we drove by his garage on the way to the State Police Post, and he said, "My stomach's killing me; I want to get a 7-Up or Sprite or something." We stopped, and while we were in there having a soft drink, the phone rang and he picked it up to answer it, and he allowed me to listen in on the call, and I know the phone conversation was between him and Joe Mike Mouser; I've received numerous phone calls from Mouser and I knew his voice, and the conversation was directed toward him; there's no question whatsoever about the person or party on the other end of the line. I made some notes to have him to ask Mouser certain questions that I

wrote out for him, and he asked those questions, and I've got the notes in my pocket. He asked those questions and Mouser answered them. The following morning, while he was in the courthouse here, Mike Kaphammer was in an examining trial for an altercation at Jerry's Restaurant, and he looked in at the county courtroom and said, "There's the bushy-headed boy right there that was with Mouser," and he was known to me as Mike Kaphammer.

MR. JAMES: And Joe Mike Mouser was the man that he said brought the stolen property to him?

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WITNESS: Yes, him and others. He didn't know the names of those others. He explained to me that at times they were brought there during the night, and Mouser would call him the next morning and tell him they were there. He has three farms and there was property on all of them that's connected with these four cases on trial.

MR. JAMES: What property were the cattle on?

WITNESS: On the Cardin residence farm.

MR. JAMES: And what property was the tobacco on?

WITNESS: On the Cardin residence farm.

MR. JAMES: And what place were the trucks or parts of trucks on?

WITNESS: The Alton Miller truck was where his son-in-law, Butch, resides. The E-Z Haul bed off of the E-Z Haul truck was on this third farm where there's a tenant house with no one residing in it.

MR. JAMES: There was property on the three places?

WITNESS: Yes, there was.

MR. JAMES: And that is the property involved in the four counts that we are trying?

WITNESS: Yes, sir.

CROSS EXAMINATION OF WITNESS IN CHAMBERS:

MR. HATCHER: Now, Mr. McQuown, you say that all this conversation took place, from which you've undertaken to make out a case, and that there was no one present but you and John A. Cardin; is that right?

WITNESS: Well, Martin Eugene Alvey was present, but he wasn't in range to hear our conversation.

MR. HATCHER: No one heard that except you and John Cardin?

WITNESS: That is correct.

MR. HATCHER: Now, with all this damaging testimony and all this criminal case that you was working on—did you have this written out and have Mr. Cardin sign it?

WITNESS: No, he didn't want to do that until he consulted with his attorney, and what he would testify to and whether he would consult with Mr. James or not was left up to him for a later decision.

MR. HATCHER: Haven't you been on the police force long enough and been around courts enough to know that when you have a statement down in writing and have the person sign it, that that is by far better evidence than oral proof?

WITNESS: That's correct.

MR. HATCHER: Then why didn't you have him sign—why didn't you write this down and have him sign it if it was so voluntary and if all this is so true?

WITNESS: He requested not to do that until he consulted with his attorney later.

MR. HATCHER: Did you request him to sign a confession?

WITNESS: Yes, I did. I asked him for a confession in writing.

MR. HATCHER: Did you write one out?

WITNESS: No, I did not. I explained that he wanted to

wait.

MR. HATCHER: When he declined to sign anything, didn't that give you some idea that there might be something wrong with it?

WITNESS: No, sir.

MR. HATCHER: Now, you appeared as a witness in a case against Alvey for burning a truck bed?

WITNESS: Yes, sir.

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MR. HATCHER: And you said Alvey was one of the individuals there when you got all this confession. You didn't testify to any of this confession or any of those facts in the Alvey trial, did you?

WITNESS: You objected.

MR. HATCHER: Well, did you undertake to relate it?

WITNESS: I would have liked to, but you objected on the—

MR. HATCHER: I didn't ask you what you'd have liked to do. I asked you if you undertook to, if you tried to introduce or volunteered that information at the trial?

WITNESS: Yes, I'm certain of that.

MR. HATCHER: And you've volunteered again in this trial; in fact, you've come out with matters without the Commonwealth even inquiring into them, and you're very anxious to get it in the record, aren't you?

WITNESS: No, I wanted to keep it in continuity. Mr. James wanted to go on to a second case, and I was not completed with the first one. I wanted to keep it in continuity.

MR. HATCHER: Let me ask you again about the Alvey trial. This confession and narration of all these events—did you testify to any of that in the Alvey case?

MR. JAMES: Judge, I don't recall all the details of it, but that certainly was not competent at that time in the Alvey trial. The question that Mr. Hatcher asked him was not com-

petent testimony in the Alvey trial, and it was not sought to be introduced. Whether or not there was any mention made of it, I don't know, but the Court would have excluded it; there were several places that these cases interwove so that there were objections to testimony on the basis that it involved other offenses.

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THE COURT: Go ahead, Mr. Hatcher.

MR. HATCHER: Now, you knew that Mr. Cardin and Mr. Alvey were both indicted for burning this truck bed, didn't you?

WITNESS: Yes, sir.

MR. HATCHER: And Mr. Cardin, according to your charges, was a confederate of Mr. Alvey in the truck bed burning?

WITNESS: Yes, sir.

MR. HATCHER: Yet, today you testify about all these admissions and confessions and you didn't testify about them in the Alvey trial?

WITNESS: Because you objected, I did not.

MR. JAMES: Again, might I interrupt and state that Alvey alone was indicted, and the charges against Mr. Cardin were in a separate indictment. That was not a joint trial.

MR. HATCHER: All right, let me ask you something else now. Did you know also that Mr. Alvey was indicted for knowingly receiving stolen property consisting of this 1965 Chevrolet truck that's referred to as the U-Haul?

WITNESS: Yes, sir, I was responsible for the testimony before the grand jury.

MR. HATCHER: And you knew that Mr. Cardin likewise was indicted for knowingly receiving that property, didn't you?

WITNESS: Yes, sir.

MR. HATCHER: And you appeared as a witness in the

Alvey case, did you not?

WITNESS: Yes, sir.

MR. HATCHER: And did you give any evidence in the Alvey case concerning the information you've just testified to that you got from Mr. Cardin about the truck—the '65 Chevrolet truck?

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WITNESS: Pertaining to the furniture pads, there was some testimony given.

MR. HATCHER: I know, but about the truck.

WITNESS: They were parts of the truck.

MR. HATCHER: Furniture pads are not part of a truck.

WITNESS: They were part of the truck as it left the owner; they were identified as their property.

MR. HATCHER: All this confessional information you didn't reveal in the Alvey trial; you say I objected to it.

WITNESS: Yes, sir.

MR. HATCHER: Well, I've got a transcript of the Alvey trial; we'll let the record speak for itself. We have it on record what you swore to now and what you swore to then.

WITNESS: Well, that may have been in chambers when that occurred about what you—where I would be allowed to testify to what John Cardin said there, because he was not on trial.

MR. HATCHER: While you're testifying, did you promise John Cardin that if he would appear as a prosecuting witness against Joe Mike Mouser and Charlie Stiles that you would see that he was not prosecuted?

WITNESS: No, sir, that's not correct. I advised him to obtain an attorney and then consult me and the Commonwealth Attorney while his attorney was present, and he did not do it.

MR. HATCHER: And did you threaten him that if he did not appear as a witness and give evidence against Mouser and

Stiles that you was going to prosecute him?

WITNESS: No, not in that threat; I had no choice but to prosecute him. He was the receiver of this property, and I'd have liked at that time, as I explained to him, to arrest the persons responsible for the theft of it, and I could have used his knowledge of it and his testimony. I also

was emphatic about having him obtain an attorney to meet with Mr. James. That could not be any fairer, in my opinion.

MR. HATCHER: Now, you said you arrested him there before you got all this confession from him; he was under arrest and he was your prisoner at that time, was he?

WITNESS: Yes, sir.

MR. HATCHER: What had you arrested him for?

WITNESS: Well, as I explained, I went there on the basis of the fire. His first arrest was on the fire, but I wasn't allowed to testify to that and I did not try to interject that.

MR. HATCHER: So you arrested him there in connection with the fire, is that right?

WITNESS: Yes, sir, I did. That was the cause of the arrest.

MR. HATCHER: And after you had him under arrest, you say you got this confession out of him about all these other things, is that right?

WITNESS: Well, all this took place at the same time. It was quite hectic at that time, people running through the woods and police cars and sirens screaming up and down the road, and the fire was in progress and we were trying to put it out to keep from destroying the bed, and Alvey trying to leave the scene at the time—it was quite hectic.

MR. HATCHER: Well, John wasn't running through the woods, was he?

WITNESS: No, he just stood there quietly and calmly.

MR. HATCHER (addressing the Court): Your Honor, as

another ground for my motion to discharge the jury because incompetent

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evidence had been volunteered against the Defendant, is this evidence of the arrest. This witness has volunteered to the jury, without being asked and before an opportunity was given for an objection, that he arrested Mr. Cardin on that occasion. He now admits that that arrest was not for any one of these four offenses that he is being tried for now, but he arrested him on the arson case which is not before the jury at this time; but the jury does have in the back of their minds now this arrest for an arson case, and that is additional damaging evidence that has been brought out before this jury.

MR. JAMES: There has been no statement at all as to what the arrest was made for—just simply that he was arrested. There are pending charges that are not being tried that do include the arson charge.

THE COURT: Do you have any further cross examination, Mr. Hatcher?

MR. HATCHER: No, sir.

THE COURT: Did Mr. Cardin want to testify relative to the voluntariness of the statements?

MR. HATCHER: Well, of course, Your Honor, this is all entirely new and surprising, and I would like to have a few minutes to confer with Mr. Cardin on this phase of it. I've never discussed it with him because I didn't know that this evidence would be introduced or tendered for introduction.

THE COURT: The testimony of the Defendant would, of course, be limited to the voluntariness of the statements.

MR. HATCHER: Yes, sir. Might I confer with Mr. Cardin on that matter?

THE COURT: Yes, sir.

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DEFENDANT AND COUNSEL CONFERRED OFF THE RECORD.

MR. HATCHER: Your Honor, as I understand the status of this evidence at this time, the inquiry will be only on the question of whether or not any statements made by Mr. Cardin were voluntarily made. Now, our evidence will be that these statements were not, in fact, made; so it would be rather difficult to go into the question of whether the statements were voluntarily made when our position will be that they were not made at all. Of course, if the matter becomes competent—if it becomes competent, of course that will be a question for the jury rather than the Court whether or not the statements were made.

THE COURT: Yes, if you are going to deny that the statements were made, then the purpose of this hearing really does become moot.

MR. HATCHER: Yes, sir, that is our position. To attack the voluntariness of a confession, I think you have to take the position that it was not made voluntarily; but if you're denying that you made it at all, there's nothing that we can testify to on the question of voluntariness. In other words, we can't say we did something and it wasn't voluntary and then turn around and say we didn't do it.

THE COURT: I hope you understand that I didn't know what your testimony would be when we came in here.

MR. HATCHER: Yeah, I understand that. So we don't have anything to introduce for Mr. Cardin at this time.

THE COURT: What happens is, that it resolves into a jury matter as to whether they were in fact made or not made. On

the voluntariness of it, if a person were admitting that they made statements and claiming that they made them involuntarily, then the Court would have to pass on it and then it is

still a question for the jury. But when there's a conflict, a direct conflict, as to whether statements were made or were not made, then I think it is a question for the jury.

MR. HATCHER: I'm objecting, of course, from my position now—I am objecting to all this conversation and these alleged statements for another reason. The other four offenses are so interwoven with them that I don't see how the Court can let this witness testify to what he has in chambers here without the jury receiving all sorts of information on other charges against him, made or not made, for which he is not being prosecuted.

MR. JAMES: Judge, while it is generally true that evidence concerning other offenses cannot be shown, where it is so tied up in a general plan or scheme, there is an exception as to intent and purpose and knowledge, and such evidence does become competent.

THE COURT: Well, I think it was proper for the witness to state why he was there; he did state that Mr. Cardin was arrested but he didn't state what for. Certainly, everyone must know that he was arrested some time or other or that he came within the jurisdiction of the Court and that charges were brought against him. I will admonish the witness, however, to answer the questions that are asked by the Commonwealth Attorney and not to volunteer information.

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MR. HATCHER: Now, another grounds for objecting to the testimony of this witness which he has given in chambers and which I assume the Commonwealth Attorney is going to ask for before the jury, is that the testimony given by the witness shows that it is a summation by him of what took place. I don't think the witness has a right to summarize and give a conclusion of what was said. I think he might repeat it word for word, if he can do that, but apparently he cannot do that, he hasn't done that; all he's done is give his narration in

summary form of the conversation and the import of it, and I'm objecting to it for that reason.

THE COURT: Well, the witness, of course, like any other witness, is bound to the facts that he saw or thinks that he heard. Certainly he cannot give it word for word, but he must give it as nearly as possible as he can as the matters were stated to him, or as he claims they were stated to him, I'll put it that way.

MR. JAMES: He will, when he testifies, relate as nearly as he can what he was told, not his conclusions.

THE COURT: That's right, not his conclusions. His conclusions are not competent, but he can state what he was told.

The motions to discharge the jury for a mistrial are overruled.

WHEREUPON COURT AND COUNSEL RETURNED INTO OPEN COURT. THE TIME FOR NOON ADJOURNMENT HAVING ARRIVED, THE COURT ADMONISHED THE JURY AS REQUIRED BY LAW, AND INSTRUCTED THEM TO RETURN IN ONE HOUR.

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AT 1:00 P.M., CAME COURT AND COUNSEL INTO OPEN COURT AND THE TRIAL WAS RESUMED AS FOLLOWS:

THE COURT: Are you ready to proceed, gentlemen?

MR. JAMES: Ready, Your Honor.

MR. HATCHER: Yes, Your Honor.

THE COURT: Waive the call of the jury?

MR. JAMES: Waive the call, Your Honor.

MR. HATCHER: Yes, Your Honor.

EXAMINATION OF THE WITNESS, RICHARD McQUOWN, CONTINUED AS FOLLOWS:

DIRECT EXAMINATION BY MR. JAMES:

Q 34 Detective McQuown, you had testified about recovering the tobacco before the adjournment; now did you or not recover the truck that belonged to Alton Miller?

A Yes, I did.

Q 35 Will you tell the jury about how that was found, and where, and what happened in connection with that truck?

A After making the initial investigation on the tobacco, the following day I went to the airport here in town, north of town, and Ben Floyd flew me over John A. Cardin's farms, and by aerial photography and surveillance, I located a 1965 Chevrolet truck owned by Alton Miller of the Yellow Cab Rental Company in Bowling Green, and the bed off of another truck—the E-Z-Haul truck—on the second farm.

Q 36 Where was the Alton Miller truck?

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A It's either KY 84 or 86 that runs through Sonora; it's about two miles out. Mr. Cardin's son-in-law resides on that farm.

Q 37 What is his name?

A I just know him as Butch.

Q 38 But you do know that he is the son-in-law of Mr. Cardin?

A Yes, I do. The truck could be seen from the highway as well as by airplane, and I have a photograph of the truck from the highway and I also have a photograph of the truck from the airplane. I'd taken a search warrant for the truck, and I went to the farm with the search warrant and recovered it.

Q 39 Now, when you recovered that truck, what condition was it in?

A The truck was a two or two and a half ton 1965 Chevrolet, and the only part of it on the farm was the cab and the frame—the chassis—and the front and rear wheels. The

bed was removed from the truck.

Q 40 Do you know of your own knowledge what type of bed had been on it?

A Yes, I do.

Q 41 What type was it?

A A moving van bed, enclosed body.

Q 42 And did or not you find that bed anyplace?

A Yes, I did.

Q 43 Where was it, Detective McQuown?

A It was behind John A. Cardin's house, right behind the barn next to his house.

Q 44 Was the bed as it was when it was on the truck?

A No, it had been cut up and partially destroyed, and when I arrived at the farm it was on fire.

Q 45 You say the bed was on fire; was that the entire bed?

A The bed consists of the wooden floor and the metal frame around it, and then the walls and the roof and the doors and the front portion of the bed had been cut away and they were gone; they weren't even there. The only portion remaining was if it were a flat bed truck that had the walls cut off of it on each side; and it was off of the truck and it was laying on the ground.

Q 46 Now, where was that located, that part of it?

A Well, it was directly behind John A. Cardin's house and barn adjacent to it.

Q 47 Now, was the truck and the part of the body or bed removed from the Cardin place?

A Yes, it was.

Q 48 Where was it taken?

A It was taken to Irwin Miller's Garage just north of town on 31W.

MR. HATCHER: May I approach the bench, Your

Honor?

THE COURT: Yes, sir.

THE FOLLOWING REMARKS WERE MADE AT THE COURT'S BENCH, OUT OF THE HEARING OF THE JURY:

MR. HATCHER: Your Honor, I object to this testimony concerning the burning of the truck, and I again move to discharge the jury because evidence of another offense has been introduced and we are not trying this case; this was severed from the case being tried, and the introduction

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of this testimony is prejudicial to the substantial rights of the Defendant.

MR. JAMES: Your Honor, this evidence goes to the condition of the truck, and knowledge and purpose and intent to conceal it, and has nothing to do with any charge of arson.

THE COURT: I think it's competent to show it; let the objection be overruled. But, again, I know you will keep as far away as you can from the other charges.

MR. JAMES: I am trying to, but it all just ties together so if you try to prove one thing you get into maybe something else; but it is all competent.

THE COURT: Well, he's not testifying that there's any charge about that, so I think it's competent. Overrule the objection.

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Q 124 Then it was on December the 12th that you went there to the residence?

A Yes, it was.

Q 125 Now, what did you do, and what did you see, and what did you hear on that occasion?

A As I arrived at John A. Cardin's residence and began to

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turn into the driveway, I met a green Ford pick-up truck driven by Williams, an employee of John A. Cardin's, coming out of the driveway. I stopped him and obtained his identification, and I looked in the truck bed and there were some heavy tools in the rear of it. I sent him on back to the garage and told him I'd contact him later. As I proceeded into the driveway, John A. Cardin was walking from his house and barn area out toward the road to meet me. He confronted me about half-way up the driveway and immediately behind him was a car, an Oldsmobile, following him out being driven by one white male. I asked John A. Cardin, "What's on fire?" and he said, "I'm just burning an old truck bed back here," and I asked him if he cared if I looked at it, and he said, "No, I guess not." He walked back there with me. At the fire, which smoke was coming from, was the Alton Miller lower section of the truck bed. It was on fire at the time. It was covered with some sort of fuel oil or kerosene—

MR. HATCHER (Interrupting): Your Honor, we'd like to object to him saying what—

THE COURT (Interrupting): Objection sustained. That's right. You may state what you saw—not what it appeared to be or anything else—just what you saw.

A (Continuing): There was a liquid on the bed and it was on fire.

Q 126 What was then done, Detective McQuown?

A Well, I examined the truck bed. The walls had been cut from it by—

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MR. HATCHER (Interrupting): We object.

THE COURT: Sustained. Just testify to what you saw, and not what had been done because you weren't there.

A (Continuing) The supports on the top portion of the bed had been cut by torch or burned—

MR. HATCHER: Your Honor, we object and I move that this witness be admonished.

THE COURT: Sustained. If the upper supports were not there, Officer, just state that they were not there.

A (Continuing) They were removed.

Q 127 Was there any conversation with Mr. Cardin after that, Officer?

A Yes, there was. He was placed under arrest.

Q 128 Wait just a minute, now. Where did that conversation take place?

A It took place behind the barn immediately adjacent to his house.

Q 129 Now, on that occasion and at that place, what occurred? What did you do?

A Well, after observing the truck bed—John A. Cardin was there with me—I immediately recognized the truck bed, and I placed him under arrest and advised him of his rights.

Q 130 When you advised him of his rights, what rights did you advise him of?

A That he had a right to remain silent and that anything he said could be used against him in a court of law; I advised him he could have an attorney with him before any questioning if he desired one, and I advised him

that if he could not afford an attorney, the Court would appoint one for him; and I asked him if he understood those rights, and he stated that he did, and he agreed to questioning.

Q 131 Were questions then asked him after that?

A Yes, they were.

Q 132 And did or not he answer them?

A Yes, he did.

Q 133 Did he at any time refuse to answer or ask for

an attorney?

A No, he did not.

Q 134 And did he appear to understand his rights?

MR. HATCHER: We object.

THE COURT: Sustained. Not how he appeared.

Q 135 Did he state that he understood his rights?

A He acknowledged that he did understand his rights.

MR. HATCHER: Your Honor, I object to this questioning unless he can repeat the conversation if he remembers the conversation. I'm objecting to him narrating, and drawing his conclusions to what the man did or what he said.

THE COURT: Well, he stated that he had a conversation with him. I think you might just have him repeat the conversation, Mr. James.

MR. JAMES: That's what I'm trying to do, Your Honor.

Q 136 Now, what took place and what was said as near as you can in the words used by you and Mr. Cardin; don't give your interpretation of it, but just tell us what was said.

A Well, I discussed with him the truck bed that was there—

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MR. HATCHER: We object.

THE COURT (Addressing witness): Well, what was said about the truck bed?

A He advised me that the truck bed was brought there by another person, and that he was removing it, dismantling it, and burning it.

MR. HATCHER: I'm not objecting to him relating the conversation; I'm objecting to him drawing conclusions as to what he was advised or what he was not advised. If he has a conversation, then I believe he can relate it, but he cannot give a narration or a summary of what anybody told him or

what he told anybody else.

THE COURT: Overruled. I understood him to say that this was part of the conversation; that Mr. Cardin told him this.

Q 137 Is or not that what Mr. Cardin told you?

A Yes, he told me that he cut the truck bed up himself; that he'd carried part of it away by truck to another location.

Q 138 Now, what else, if anything, did he tell you?

A He told me who brought it there.

Q 139 Tell us what he said, in his words.

A He told me that Joe Mike Mouser brought the truck bed there and that he brought the tobacco in the barn there to the farm, and that he himself had cut this truck bed up and removed portions of it to the other farm to the west, and that he'd buried it—had a bulldozer there to bury it—and I asked him if anyone else was with Joe Mike Mouser at the time and he said he didn't know their names but there were others there at the time. I asked him

about Mr. Alvey, who was present, if he was there at the time during which any of these vehicles were brought—

MR. HATCHER: Your Honor, I submit that he is narrating, not testifying to the conversation.

THE COURT: Just testify to what the conversation was, Officer.

MR. HATCHER: If you overrule my objection, I can't stop him from going ahead and narrating it; but I want the Court to know it's over my objection.

THE COURT: Officer, can't you just testify as to the conversation between you and Mr. Cardin?

WITNESS: I'll try, but it's difficult.

* * *

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Q 144 What, if anything, did he say then about the trucks?

A He told me that he took the bed portion of this truck that was on fire there and had buried it on the back of one of his farms with a bulldozer; he had a man to do this. And that the E-Z-Haul truck bed had been brought in there after he built a bridge across the road there—the bridge had been washed out—and he had a bulldozer man in there to do that, so he just had him to cover that bed up at the same time. And then when the bridge was built, this truck bed was brought in there. He said about the E-Z-Haul truck that was brought to Edlin's Machine Shop, he told me that he called Edlin's and told them he was bringing a truck up there and that he was going to have it worked on for a man that brought it in, a customer; and he told me that he drove it there himself to Edlin's Machine Shop.

Q 145 Did he or not tell you of any use of that truck by him?

A Yes, he did.

Q 146 What did he say?

A He told me that he hauled some of the tobacco that belonged to Albert Parsley that we've been discussing to a tobacco barn, and he'd show me where that tobacco was Monday—this was on a Saturday, the 12th of December, 1970; he indicated that on the 14th, he'd tell me where the tobacco was, that he wanted some time. I insisted, two or three different times, to tell me where it was for fear it would be lost; and he refused, and said,

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"I'll just wait until Monday, just take my word for it and I'll tell you where the tobacco is Monday." So I had no other choice. He told me he took the tobacco to the warehouse—

Q 147 (Interrupting) Now, was this on Monday that

he told you this?

A Yes, on Monday. He told me while we were standing there; there was a flat bed off of another truck laying beside the burning one, and he said, "I hauled the tobacco on that bed right there."

Q 148 Did he say what vehicle the bed was used on?

A Yes.

Q 149 What vehicle was it?

A They had put that black wooden cattle bed, flat, on the Alton Miller 1965 Chevrolet truck which was in the telephoto lens photo, and then they'd removed that bed from it and they were going to take that bed because that truck was breaking down all the time on these trips these fellows in it was involved in; it wasn't good enough for them so they wanted a good truck, and so that's why they were going to put the bed on the 1970 new Chevrolet E-Z-Haul truck, and that's why the frame was being lengthened.

Volume II

June 27, 1972 (continued)

MR. A. O. BINGENHEIMER'S TESTIMONY

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A. O. BINGENHEIMER, CALLED AS WITNESS ON BEHALF OF THE COMMONWEALTH OF KENTUCKY, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

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DIRECT EXAMINATION BY MR. JAMES:

Q 1 Is your name A. O. Bingenheimer?

A Yes, sir.

Q 2 Where do you live, Mr. Bingenheimer?

A Minneapolis, Minnesota.

MR. HATCHER: I wonder if we could get you to spell your name?

WITNESS: B-i-n-g-e-n-h-e-i-m-e-r.

Q 3 By whom are you employed?

A National Car Rental.

Q 4 Now, what, if any, is the connection between that and E-Z-Haul?

A E-Z-Haul is a wholly owned division.

Q 5 So E-Z-Haul is owned by National Car Rental?

A Yes, sir.

Q 6 Mr. Bingenheimer, were you ever, in the course of your employment, located in Louisville, Kentucky?

A Yes, sir.

Q 7 What period of time were you there?

A Up until January of '71.

Q 8 You were there, then, during November and December of 1970?

A Yes, sir.

Q 9 Now, during the month of December, 1970, was a 1970 Chevrolet truck, green in color, I believe, rented by E-Z-Haul to a James H. Steel?

A Yes, sir.

Q 10 Is that the rental contract for that truck?

A Yes.

Q 11 Now, under this contract, for what period of time was the truck rented?

A I believe it's December 5th through the 7th—let me see here. Yes, through December the 7th.

Q 12 Now, on December the 7th, was the truck supposed to be returned under that rental agreement?

A I'm looking for the return date, sir. I don't see it right off.

THE COURT: Mr. James, I'm afraid no one is hearing

Mr. Bingenheimer.

MR. JAMES: I might stand back a little, that might help.

A (Continuing) I don't see the return date on here, sir.

Q 13 Was the truck returned during the rental period?

A No, sir.

Q 14 Was or not it reported as stolen or converted?

MR. HATCHER: We object to what was reported.

THE COURT: Sustained. Just what happened.

Q 15 Well, tell the jury just what happened, Mr. Bingenheimer.

A Well, we received a call from the State Police Post in E-town requesting a serial number—

MR. HATCHER: We object.

THE COURT: Well, he may state whether the truck was returned or what he knows about it. Now, calls that he got from someone else, I doubt if they're competent.

MR. JAMES: I'll ask him this, Judge, to make it clear.

Q 16 Did or not you come to Elizabethtown in connection with that truck?

A Yes, sir.

Q 17 Where did you go, Mr. Bingenheimer?

A I went down the street to a garage down here.

Q 18 And did or not you see the truck?

A Yes, sir.

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Q 19 Now, you say you went down the street down here. Do you know the name of the place you went?

A Edlin's, I believe, is the name of it.

Q 20 Edlin's Machine Shop?

A Yes, sir. Edlin's.

Q 21 Now, there, did you or not see your truck or any part of it?

A The cab and chassis were in the shop, sir.

Q 22 Now, did or not it have a serial number?

A Yes, sir.

Q 23 What was the serial number of the cab and chassis?

A Let me see. The serial number was CE-530-P-157436.

Q 24 And was that number on the chassis?

A Yes, sir.

Q 25 Did you see the body of the truck anywhere?

A Not at that garage, sir.

Q 26 Where did you see the body of the vehicle?

A It was on a hillside out here in the country somewhere.

Q 27 How did you get to where it was, Mr. Bingenheimer?

A I went with Mr. McQuown and some other officer.

Q 28 Was it Detective McQuown and maybe Detective Chambers?

A Yes, sir.

Q 29 Do you know yourself where you went and saw it?

A By name, I don't know.

Q 30 Was the body that you saw the body of your truck?

A Yes, sir.

Q 31 At the place you did go?

A Yes, sir.

Q 32 Mr. Bingenheimer, I show you Commonwealth Exhibit No. 19 and ask you if you recognize that?

A Yes, sir, I do. It's a rental contract folder.

Q 33 Will you speak out louder?

A It's a rental contract folder which we use in our truck rental business.

Q 34 Now, I'll show you two license tags, they being each, Oregon at the top, and T297629, and ask you if you know anything about those license tags?

A They belonged to this particular truck.

Q 35 To the '70 Chevrolet we've been talking about?

A Yes, sir.

Q 36 Now, on each tag is written some letters and some numbers. Do you see that on each one of these?

A Yes, sir.

Q 37 Does that have any significance, and if so, what?

A It's an identifying number for our own purposes; it's a unit number that we assigned to that particular vehicle.

Q 38 And is this number B04836?

A Yes, sir.

Q 39 Assigning it to what vehicle?

A Well, to that particular Chevrolet that we were—

Q 41 (Interrupting) The 1970 Chevrolet?

A Yes, sir.

Q 41 Now, had that vehicle had any license in the month of December, 1970, other than this Oregon license?

A Yes, sir, it should have had a pro-rate—or it did have a pro-rate plate assigned to it.

Q 42 What is that?

A Well, it's an additional plate that you don't have here and I don't recall that I ever saw it on the truck or the body.

Q 43 Now, have you given anybody—James H. Steel, or anybody else—permission to keep this truck beyond December the 7th?

A No, sir.

Q 44 Or to remove the body from it or to make any changes of any kind to it?

A No.

Q 45 Mr. Bingenheimer, I'll show you Commonwealth Exhibit No. 16 which has been identified as being a picture of license plates in the cab of the vehicle. Would you examine that picture and state whether or not you know what those tags are that are shown in that picture?

A Yes, sir, the Oregon plate which we have here, and the pro-rate plate which I just mentioned, the Wisconsin pro-rate plate.

Q 46 Now, the pro-rate plate which you say is a Wisconsin plate, was also on the vehicle as well as the—

A (Interrupting) Normally, yes, sir, on the front of the vehicle.

Q 47 And that was the pro-rate plate, the Wisconsin plate?

A Yes, sir.

Q 48 Mr. Bingenheimer, did you make an examination of the chassis of the truck, of whether or not any changes had been made in it?

MR. HATCHER: Your Honor, I object. I think he can only testify to what he saw.

THE COURT: Just what he saw. That is correct.

Q 49 Well, did you make an examination?

A Yes, sir.

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Q 50 Did you see anything about it that you noticed?

A Yes, sir. The chassis had been altered—lengthened.

MR. HATCHER: We object, and move that the witness be admonished for defiance of the Court's order. He said the length—

THE COURT: He said what he saw was that the chassis

had been altered. What did you notice about the chassis (addressing the witness)?

WITNESS: It was lengthened, sir. An additional length of steel was put in the frame which resulted in a longer chassis in the truck.

Q 51 And you saw that yourself?

A Yes, sir.

Q 52 And did you see and observe the body?

A Yes, sir.

Q 53 What, if anything, did you notice about the body, and what did you see?

A The E-Z-Haul identification had been removed from it, or attempted. It was obliterated.

MR. HATCHER: I guess there's not any use in objecting, Your Honor, as long as he's said it.

THE COURT: I think he's stating what he saw. I mean that—

MR. HATCHER: Okay.

THE COURT: What he observed; not what he assumes somebody else might have done. But the witness may testify to what he saw himself.

MR. JAMES: You may cross examine.

CROSS EXAMINATION BY MR. HATCHER:

Q 54 Mr. Bingenheimer, are you still with the National Car Rental or are you in some other business now?

A I'm with National Car Rental.

Q 55 Now, I take it you have no personal knowledge of having rented this truck or leased it out to this man Steel, do you?

A No, sir.

Q 56 All you have to go on is the record which has been filed here, and some testimony which was found in the cab of the truck?

A That is correct.

Q 57 And whatever agreement there was between Steel and the car company you work for, all you know about it is what is embodied in that contract, is that right?

A Yes, sir.

Q 58 You don't have any knowledge of any agreement or understanding with Steel except what's in that contract?

A None, sir.

Q 59 And according to that contract, the truck was leased out on December the 5th, 1970, and is there anything in that contract stating when that truck was to be returned?

A I don't see it in this particular one.

Q 60 So if that truck was delivered to Steel on that date pursuant to that agreement, Steel rightfully had possession of it at that time, didn't he?

A That's correct, sir.

Q 61 Now, what was done with the bed and the chassis of that truck after you found them down here, you say?

A Well, I really don't know. They were towed into a garage here, I'm not exactly certain where; I don't go personally in with them.

Q 62 Was either one of them sold to anyone?

A The truck eventually was sold.

Q 63 How about the bed?

A I really don't know. I had left town and it was handled by an attorney here in E'town, the sale of the vehicle.

Q 64 What attorney?

A Collier, I believe—Mr. Arnett.

Q 65 Are they the attorneys for your collision insurance carrier?

A Not to my knowledge.

Q 66 You did have collision insurance on them, didn't you?

A No, sir.

Q 67 Doesn't that contract say you did?

A No, sir, it doesn't.

MR. HATCHER EXAMINED RENTAL CONTRACT

Q 68 Well, it says collision damage waiver, $250.00 deductible applies excepted. Well, you've got it in fine print over here and I can't read it.

A That's true.

MR. HATCHER: I believe that's all.

REDIRECT EXAMINATION BY MR. JAMES:

Q 69 Mr. Bingenheimer, what position did you hold with the local office of your company?

A I was the Operations Manager.

Q 70 As such, were you in charge of the rental vehicles?

A Yes, sir.

Q 71 Were you or not, or are you familiar with the fair and reasonable market value of this vehicle in December of 1970 in this area?

A Approximately, yes, sir.

Q 72 What would that be?

A Probably in the neighborhood of $5,000.00 at that time.

MR. JAMES: That's all.

RECROSS EXAMINATION BY MR. HATCHER:

Q 73 When had you last seen this particular vehicle?

A When had I last seen it? Before when, or what time, sir?

Q 74 Before it was leased out to Steel.

A I couldn't say that I myself had seen it prior to

that time.

MR. HATCHER: Your Honor, I move that his testimony concerning the value be stricken.

THE COURT: Do you want to interrogate him further, Mr. James?

MR. JAMES: I do, Your Honor.

REREDIRECT EXAMINATION BY MR. JAMES:

Q 75 Mr. Bingenheimer, you say that you don't recall, or you don't know whether you had seen it before that time?

A That is correct, sir.

Q 76 Were you. in general, familiar with the vehicles, whether this particular one or not, in your custody and under your control?

A Yes, sir.

Q 77 Now, were or not those vehicles under your control in the operation of this office?

A Yes, sir, they were.

Q 78 And kept and maintained under your supervision?

A That is correct.

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Q 79 Now, would or not you keep and maintain a vehicle that had a value of less than a hundred dollars?

MR. HATCHER: We object. If he don't recall ever seeing this vehicle, I don't see how he can give any opinion on the value of it, Your Honor.

THE COURT: Well, he saw it here.

MR. HATCHER: He never saw it before, though.

Q 80 Would you keep a vehicle that was worth under $100.00?

A Not normally, no, sir.

Q 81 And in this type of business, do you or not have to keep your vehicles in good condition?

A Yes.

MR. JAMES: That's all.

MR. HATCHER: I don't have anything further.

THE COURT: What was the value of the vehicle you saw here?

WITNESS: That would have to be an estimate or a guess. Perhaps $1500.00, or something like that.

MR. JAMES. I don't think the jury could hear him, Your Honor.

THE COURT: He said around $1500.00 when he saw it.

MR. JAMES: Mr. Hatcher, will you want Mr. Bingenheimer any more?

MR. HATCHER: No, as far as I'm concerned, he can be finally excused.

* * *

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MR. EUGENE MILLER'S TESTIMONY

JOSEPH EUGENE MILLER, CALLED AS WITNESS ON BEHALF OF THE COMMONWEALTH OF KENTUCKY, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY MR. JAMES:

Q 1 Is your name Joseph Eugene Miller?

A Yes, sir.

Q 2 Where do you live, Mr. Miller?

A Bowling Green, Kentucky.

Q 3 Are you the son of Alton Miller?

A Yes, sir.

Q 4 Has your father recently been injured in an automobile accident?

A Yes, he has.

Q 5 Is he able to be here in Court?

A No, sir.

Q 6 Is he in the hospital now?

A He's in intensive care.

Q 7 Mr. Miller, have you been associated with your father in the trucking rental business in Bowling Green, Kentucky?

A Yes, sir.

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Q 8 Are you or not familiar with a 1965 Chevrolet with a moving van, or furniture van, type of body on it that was rented from your company in November or December of 1970?

A Yes, sir.

Q 9 I believe that rental was to a James H. Steel, was it not?

A Yes, sir.

Q 10 Did you have any part in this rental?

A No, sir, I didn't.

Q 11 Now, was the truck returned to the company in accordance with the rental provisions?

A No, sir, it wasn't.

Q 12 And when rented, were there any contents in the body of the vehicle?

A They rented a dolly and twelve pads with it.

Q 13 Have you seen the truck since it was rented?

A We got the chassis and the cab back.

Q 14 The chassis and the cab?

A Yes, sir.

Q 15 And was or not the body gone?

A The body was gone, yes, sir.

Q 16 Have you seen any part of that body?

A No, I have not.

Q 17 Now, at the time it was rented, what was the fair and reasonable market value of the truck and the moving van

body?

A Just off-hand, I would say close to $2400.00—maybe more than that with that kind of body on it.

Q 18 Will you speak up louder so the jury can hear you?

A I say I don't really know the exact—what it would be worth—but with that type of van body on it, it would be

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close to or more than $2400.00, somewhere along there.

Q 19 It would be well over a hundred dollars, wouldn't it?

A Oh, yes, sir.

Q 20 Now, Mr. Miller, when you got the chassis and the cab, was that your truck? You identified it as being your truck?

A Yes, sir.

Q 21 Had it been kept and retained beyond the rental period without your permission?

A Yes, sir.

Q 22 And had anybody your permission or authority to remove the body from it or do anything at all to it?

A No, sir.

Q 23 Now, do you know what the serial number of the truck was?

A I don't have that information with me.

Q 24 I will show you a copy of the invoice for the vehicle.

(THE COMMONWEALTH ATTORNEY SHOWED A PAPER TO THE DEFENSE COUNSEL, THEN HANDED IT TO THE WITNESS.)

Now, from that copy can you tell us what the serial number was?

A The serial number is not listed on this; you'd have to have the license.

Q 25 This is an invoice at the time you bought it?

A This is the rental agreement.

Q 26 Was there any way you could identify, other than the serial number, the chassis and cab of that truck?

A The cab was the same color; you can look at the cab and tell it was the same truck.

Q 27 Well, are you or not positive that that was your truck?

A Yes, sir, it was our truck.

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Q 28 Do you have any papers with you at all pertaining to this?

A I have just the copies you have, and this is more clear.

Q 29 This was the vehicle that was purported to be rented to James Steel?

A Yes, sir.

Q 30 Was or not the chassis and cab returned to you as owners of it?

A Yes, sir.

Q 31 And have you kept and used the vehicle?

A Yes, sir.

Q 32 Is it in use now?

A Yes, sir, it is.

Q 33 And that is the same vehicle that you got here in Elizabethtown after it had been rented as we've talked about?

A Yes, sir.

MR. JAMES: That's all.

CROSS EXAMINATION BY MR. HATCHER:

Q 34 This truck—you say it was a 1965 Chevrolet?

A Yes, sir.

Q 435 And who owned that truck?

A It's the property of the Yellow Cab U-Drive-It Company.

Q 36 Well, do you own the Yellow Cab U-Drive-It Company?

A My father does.

Q 37 Your father does?

A Sir?

Q 38 I say your father owns it? Is it a corporation?

A Yes, it's a corporation.

Q 39 Are you an agent or an officer of that corporation?

A I'm an officer.

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Q 40 How long have you been an officer in it?

A About two years.

Q 41 And were you familiar with this transaction when this vehicle was rented to this fellow Steel?

A At the time it was rented, I wasn't, no, sir.

Q 42 Who was it rented it to him, your father?

A No, sir; the girl who worked in the office and my brother had rented it to him.

Q 43 Then about all you know about is is what's on that rental agreement that Mr. James showed you?

A Yes, sir.

Q 44 You wouldn't have any personal knowledge of the rental of it other than what the record shows there?

A That's right.

Q 45 And that record shows that it was rented to James H. Steel?

A Yes, sir.

MR. HATCHER: Do you have a copy of that, Mr. James?

MR. JAMES: Mr. Miller may have a better copy of it.

Q 46 Do you have a copy of it?

A Yes, sir. (WITNESS HANDED COPY TO MR. HATCHER.)

Q 47 So Mr. Steel, who rented the truck, legally obtained possession of it—that is, with the permission of the owner, did he?

A Yes, sir.

MR. HATCHER: I believe that's all.

MR. JAMES: Will you want Mr. Miller any more?

MR. HATCHER: No.

MR. JAMES: Mr. Miller, you may be excused.

* * *

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June 28, 1972

DEFENSE COUNSEL'S MOTION FOR A DIRECTED VERDICT

WHEREUPON THE COURT ANNOUNCED THAT THERE WERE MATTERS TO TAKE UP IN CHAMBERS, ADMONISHED THE JURY, AND ALLOWED THEM A RECESS. THE FOLLOWING PROCEEDINGS WERE HAD OUT OF THE HEARING OF THE JURY:

MR. HATCHER: Your Honor, the Commonwealth having introduced its proof and rested, and at the conclusion of all the proof introduced by the Commonwealth, comes the Defendant and moves the Court to direct the jury to return a verdict of not guilty because the evidence introduced by the Commonwealth, with all reasonable inferences to be drawn therefrom, is not sufficient to prove all of the elements or offenses for which the Defendant is charged and for which he is being tried; and for that reason, the Defendant is entitled to a directed verdict for acquittal at this time and moves the Court to so order same on each of the four counts of the indictment for which the Defendant is being tried.

MR. JAMES: To which motion, the Commonwealth objects, and submits that it is a jury question and that the evidence standing unexplained is sufficient for a jury to decide.

THE COURT: I feel at this time that a jury question does exist,

and for that reason I overrule the motion for a directed verdict.

MR. HATCHER: The Defendant at this time moves the Court to declare a mistrial and discharge the jury and continue the trial of this case, because by the previous ruling of the Court the Commonwealth was directed to elect which count or counts of the indictment it would try the Defendant on, having sustained Defendant's motion for a severance. Pursuant thereto, the Commonwealth did elect to try the Defendant only on Counts 1, 2, 3, and 4 of the indictment. In the course of the trial, the Commonwealth has introduced extensive evidence pertaining to the other four counts of the indictment which were not on trial, and for that reason has violated the Court's order sustaining a motion for the severance, and has materially prejudiced the Defendant by placing before the jury evidence concerning the four counts for which the Defendant is not being tried, even including evidence of the arrest of the Defendant on one of the counts that is not being tried.

MR. JAMES: To which motion the Commonwealth objects, and without any specifics other than have been stated, replies that the Commonwealth has not introduced any evidence that does not come within the scope of admitted evidence and that is not directly connected with the four counts, either in proof of those counts or in proof of a common plan, scheme, intent, motive, and knowledge. There has been no evidence of what he was arrested for and, in

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fact, the officer has testified that he arrested him and stated that there were no formal charges made, and that he was in error in saying that he had made formal charges, and he could well have been referring to any one of the four counts, and there is no evidence that he was not referring to the arrest for them. Other than that, the motion of Defendant does not allege any specific item that would be prejudicial in this proceeding.

MR. HATCHER: Well, as far as alleging specific items, the case is resplendent with evidence of burning of the truck bed which is an additional charge, and also of the tobacco at the Greensburg warehouse.

MR. JAMES: There is no evidence except as to "other tobacco" other than the Parsley, which was part of it. There is no evidence concerning the burning of the bed except as would be proof of attempt to destroy the identity of the motor vehicle, and assert the knowledge of Defendant.

THE COURT: I think the Commonwealth may prove facts to show knowledge and intent and purpose, even though the facts may at times refer to other matters for which the Defendant is charged. Of course, he is not being tried on those and the jury will not be instructed on those if it goes to the jury. And I feel at this time that the Commonwealth has confined itself as best it could and sufficiently. I do know that some matters have been brought out on cross examination, and things like that; but I feel that the Commonwealth has confined itself sufficiently, and I overrule the motion for a mistrial.

VOLUME III

June 29, 1972

MOTIONS BY DEFENSE COUNSEL FOR A DIRECTED VERDICT AND DECLARATION OF A MISTRIAL.

Defendant's Motions for Directed Verdict and Mistrial

THE FOLLOWING PROCEEDINGS WERE HAD IN CHAMBERS, OUT OF THE PRESENCE AND HEARING OF THE JURY:

MR. HATCHER: At the conclusion of all the proof in this case, comes the Defendant and moves the Court to peremptorily instruct and direct the jury to return a verdict of not guilty as to Count No. 1, and as to Count No. 2, and as to Count No. 3, and as to Count No. 4 of the indictment, because sufficient evidence to prove all of the necessary elements of the offense charged has not been introduced on behalf of the Commonwealth; and such evidence as has been introduced on behalf of the Commonwealth has been completely and successfully explained by the evidence introduced by the Defendant, and for said reason, Defendant moves for a directed verdict as to each count for which he is being charged.

MR. JAMES: The Commonwealth objects to such motion, and without reviewing the evidence in detail, states that there is a jury question on each of the four counts.

THE COURT: I think it's a jury question, and I think there is sufficient evidence for the jury to consider, and I think it should be considered by the jury; so I overrule the motion for a peremptory instruction on each of the counts.

MR. HATCHER: The Defendant moves the Court to declare a mistrial and discharge the jury and continue the case because of the introduction into evidence of four other offenses which were alleged in the indictment and which were not to be tried in the trial of the offenses alleged in the first four counts; and states in support thereof that the Commonwealth introduced evidence of the offenses alleged in Counts 5, 6, 7, and 8 of the indictment; that the Defendant by counsel has heretofore objected thereto and has moved the Court to discharge the jury for reason thereof but that the Court has overruled said motion and objections, which placed

the Defendant in the burdensome position of having to introduce evidence in rebuttal to and explanation of the evidence introduced by the Commonwealth as to each of the other four counts in the indictment which are not being tried. The Defendant was reluctant to introduce evidence in these matters, but since the Court had permitted the Commonwealth to introduce evidence, the Defendant necessarily had to follow up that evidence and introduce his evidence on the said matters. So the evidence introduced by the Commonwealth and the evidence which the Defendant was required to introduce to explain or contradict same, has placed the Defendant in jeopardy as to four other offenses which the Court has heretofore ordered to be severed and which the Commonwealth has elected to be severed from the counts in the indictment, 1, 2, 3, and 4, which the Commonwealth elected to try and which are the only counts that should have been tried at this time.

MR. JAMES: The Commonwealth objects to this motion for the same reasons and on the same basis as stated when the motion was made previously.

THE COURT: Well, I still feel that the Commonwealth has very well restricted itself to the four charges that are being tried. There was evidence of the truck bed being burned but I think that there was nothing about the charge for that; there was evidence about questions being asked at that time, but I do think that it was competent in conjunction with the receiving one of the trucks. As for the other three counts, which all concerned tobacco, I don't feel that they have been mentioned significantly, if at all. For that reason, I overrule the motion.

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SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 74-1

JOHN A. CARDIN ..... PETITIONER

V.

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE PROSECUTION FAILED TO PROVE AN ESSENTIAL ELEMENT OF THE OFFENSE CHARGED WHICH WOULD CONSTITUTE A VIOLATION OF THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT?

II. WHETHER THE TRIAL JUDGE VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT BY FAILING TO GIVE INSTRUCTIONS LIMITING THE PURPOSE FOR WHICH EVIDENCE PERTAINING TO CERTAIN TOBACCO AND A BURNING TRUCK BED SHOULD BE USED?

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 74-1

JOHN A. CARDIN ..... PETITIONER

V.

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Opinion Below from the Kentucky Court of Appeals is a Memorandum Opinion, not to be cited as authority, and is correctly set forth in the petitioner's Appendix at pages 1a-2a of his Petition for Writ of Certiorari.

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because it fails to meet the jurisdictional requirements of Title 28 U.S.C. § 1257(3).

The petitioner premises his Petition for Writ of Certiorari upon the following two contentions: that he was denied his right of due process under the 14th Amendment to the United States Constitution upon the grounds that (1) one of the essential elements of the offense of knowingly receiving stolen property, KRS 433.290, was not established by the prosecution's evidence; and, (2) that the trial judge erred in failing to give instructions limiting the purpose for which certain evidence of other alleged crimes should be used.

(1) In regard to the petitioner's first contention, the precise constitutional question presented by the petitioner, i.e., an alleged error by the trial court which supposedly violated a constitutionally protected right, is raised for the first time in petitioner's petition for writ of certiorari and for this very reason should now be dismissed by this Court. *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378 (1935); *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932).

As this Court is aware, certiorari jurisdiction does not lie where a substantial federal question is not raised and presented in the state court. *Newsom* v. *Smyth*, 365 U.S. 604 (1961); *Central Vermont Railway Co.* v. *White*, 238 U.S. 507 (1915); *Bothwell* v. *Buckbee-Mears Co.*, 275 U.S. 274 (1927); *Monks* v. *New Jersey*, 398 U.S. 71 (1970); *Edelman* v. *California*, 344 U.S. 357 (1953); *Tacon* v. *Arizona*, 395 U.S. 238 (1969).

Moreover, perusal of the Memorandum Opinion of the Kentucky Court of Appeals reveals that this issue was

decided solely upon adequate, independent, non-federal state grounds. Thus, the petition should be dismissed upon this ground as well. *Missouri Pacific Railroad Co.* v. *Hanna*, 266 U.S. 184 (1924).

Also, Rule 23(1)(f) of this Court requires that a petitioner seeking review by certiorari must specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal question sought to be reviewed were raised. In the instant case, the petitioner has not pointed out nor made reference to the record below which would establish where and the manner in which he presented the federal questions he now raises. Thus, even if the petitioner had raised the federal questions in the courts below, which he did not, his failure to comply with Rule 23(1)(f) forecloses certiorari review by this Court now. After all, "the jurisdiction of this Court to re-examine the final judgment of the state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." *Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, 655 (1897).

In any event, the issue now presented by the petitioner does not constitute a substantial federal question and for this reason the petition should be dismissed. *Maryland and Virginia Eldership of Churches of God* v. *Church of God at Sharpsburg, Inc.*, 390 U.S. 367 (1970).

In addition, this Court has consistently adhered to the self-imposed principle that it will not review a state

court judgment based upon an adequate and independent non-federal ground even if the federal question had been properly raised, which is not the case here. *Berea College* v. *Kentucky,* 211 U.S. 45 (1908). The opinion of the Kentucky Court of Appeals reflects that its decision was based solely upon state grounds and not dependent in any manner, or touching upon, a substantial federal question. For this reason, this Court has no jurisdiction to review the decision of the Kentucky Court of Appeals upon a Petition for Writ of Certiorari since its power over state judgments is to correct them only to the extent that they incorrectly adjudged federal rights. *Herb* v. *Pitcairn,* 324 U.S. 117 (1945); *Dixon* v. *Duffy,* 342 U.S. 33 (1951); *Young* v. *Ragen,* 337 U.S. 235 (1949); *Madden* v. *Kentucky,* 309 U.S. 83 (1940); *Henry* v. *Mississippi,* 379 U.S. 443 (1965). Here, there is no federal question involved.

In fact, this Court has no jurisdiction to review the decision of the Kentucky Court of Appeals since the record does not affirmatively indicate the the federal question now in issue was presented to that court, and that the federal question now raised was not necessary to the determination of the cause before the Kentucky Court of Appeals, and that court did not decide the federal question now raised, and that the decision of the Kentucky Court of Appeals as rendered was given without deciding the federal question now raised by the petitioner. *Southwestern Bell Telephone Company* v. *State of Oklahoma,* 303 U.S. 206 (1938); *People of New York*

ex rel Consolidated Water Company of Utica v. *Maltbee,* 303 U.S. 158 (1938).

Finally, as this Court is aware, certiorari jurisdiction is completely discretionary under Rule 19 and the respondent submits that the petition for writ of certiorari should be dismissed since the issue raised by the petitioner does not arise under such exceptional circumstances that this Court should review the decision of the Kentucky Court of Appeals and, in fact, presents no federal question at all, much less a substantial federal question which would merit the discretionary exercise of this Court's review by certiorari. *Department of Mental Hygiene* v. *Kirchner,* 380 U.S. 194 (1965); *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969).

(2) The petitioner's second contention, concerning the alleged error on the part of the trial judge in failing to give instructions limiting the purpose for which certain evidence of alleged other crimes should be used, was not couched in terms of a denial of the petitioner's right to due process of law under the 14th Amendment to the United States Constitution when presented on appeal to the Court of Appeals of the Commonwealth of Kentucky. Therefore, this contention cannot be a basis for review by certiorari by this Court for the same reasons as previously indicated in response to the petitioner's first contention. Also, it should be noted that the issue, as presented to the state court, was not decided or mentioned in the opinion rendered by the Kentucky Court of Appeals. In such a case, this Court will not undertake to review what the court below did not decide.

Walters v. *City of St. Louis*, 347 U.S. 231 (1954); *Stembridge* v. *Georgia*, 343 U.S. 451 (1952).

Finally, the petitioner attempts to establish that both his contentions present issues which reflect a conflict of decisions between various state and federal courts. However, an analysis of the issues presented and a cursory review of the authorities cited by the petitioner reveal no real conflict insofar as they pertain to the instant petition for writ of certiorari.

SUMMARY

In summary, the respondent submits that the petitioner's application for Petition for Writ of Certiorari should be denied because it fails to meet the jurisdictional requirements of Title 28 U.S.C. § 1257 (3). After all, the purpose of review by way of certiorari is not to give the defeated party another hearing but to provide a method of correction of judgments which violate federal rights, which is not the case here. Moreover, certiorari jurisdiction is completely discretionary and in the instant case the petitioner has failed to establish that this Court should grant review by certiorari. Supreme Court Rule 19. This is particularly so in the case at bar since the issues raised on appeal to the Kentucky Court of Appeals were not cloaked in the guise of federal questions as they are now presented to this Court and, in any event, the Kentucky Court of Appeals opinion was predicated solely upon adequate, non-federal, state grounds.

The respondent will now endeavor to respond to both of the petitioner's contentions as if they were properly before the Court, even though respondent maintains they are not.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

KENTUCKY REVISED STATUTES 433.290

Any person who receives any stolen property, the stealing of which is punishable as a crime, knowing it to be stolen shall be liable to the same punishment as the person stealing it. Any person who violates this section may be convicted, although the principal offender has not been convicted. The possession by any person of any stolen property shall be prima facie evidence of his guilt under this section.

CONSTITUTION OF UNITED STATES, AMENDMENT XIV, SECTION 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abidge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COUNTERSTATEMENT OF THE CASE

On January 14, 1970, the Hardin County Grand Jury returned an eight count indictment against the petitioner, John A. Cardin. However, the trial court granted petitioner's motion for severance and he was only tried upon four counts, each involving knowingly receiving stolen property as proscribed by KRS 433.290. At trial the petitioner plead not guilty and testifield in his own behalf. However, a jury in the Hardin Circuit Court returned a verdict finding the petitioner guilty on all four counts and his punishment was fixed by the jury at one year imprisonment in the State Penitentiary on each count. The sentences are to be served consecutively. Judgment was entered accordingly and the petitioner brought an appeal to the Kentucky Court of Appeals alleging four grounds of error. However, the Court affirmed the petitioner's conviction and denied a petition for rehearing that he subsequently filed.

The petitioner is a farmer and businessman who lives near Sonora, in Hardin County, Kentucky. Where he owns and operates three farms, a crop spraying business, and a garage. As a consequence of an investigation conducted by the Kentucky State Police involving certain stolen property, the Hardin County Grand Jury returned an indictment against the appellant which included four counts of knowingly receiving stolen property.

The aforementioned counts involved: (a) a 1965

Chevrolet truck owned by the Yellow Cab U-Drive It Company, Alton Miller owner; (b) a 1970 Chevrolet truck owned by E-Z Haul Company located in Louisville, Kentucky; (c) twenty-four head of Holstein cattle, owned by James Parker; (d) finally, 6000 lbs. of leaf tobacco owned by Albert Parsley.

Police investigation in regard to the above items and their connection with the petitioner centered around four days, the 10th, 11th, 12th and 14th of December, 1970. On Thursday, December 10, 1970, Detective Sgt. Richard McQuown of the Kentucky State Police, in connection with other investigations, went to Sonora to obtain a search warrant for a barn located on the farm owned by the petitioner and where he resided (Farm #1). A subsequent search of this barn established that it housed a certain quantity of leaf tobacco which had been stolen from Albert Parsley. (Respondent's Appendix, hereinafter Res. App., 2a-3a). He also indicated that he had leased the barn two months prior to the investigation to an Edward Jarrett. However, neither the Commonwealth nor the appellant was able to find and produce Mr. Jarrett for trial. (Res. App. 63a-66a).

On the following day, December 11, 1970, after having received certain information by telephone, Detective McQuown, of the Kentucky State Police, went to Edlin's Machine Shop in Elizabethtown, Kentucky, where he found a 1970 Chevrolet truck whose bed had been removed. The truck was identified as belonging toE-Z Haul Rental Company of Louisville, Kentucky. (Res. App. 76a-79a) On the rear of the truck was a

1970 Kentucky farm truck tag which had originally been issued to the petitioner for one of his farm trucks. A lease agreement executed between E-Z Haul and a certain James H. Steele was found in the cab of the truck on the dash. (Res. App. 27a-28a). On the floor of the cab were found two truck tags from the states of Oregon and Wisconsin. (Res. App. 26a). Subsequent information revealed that the petitioner had driven the truck to Edlin's and requested that the chassis be lengthened by five feet (Res. App. 37a-38a, 116a), because the stolen 1965 truck kept breaking down. (Res. App. 39a).

On this same date, Det. McQuown had an airplane pilot fly him over the three farms owned by the Petitioner. (Res. App. 10a-11a). During the course of this aerial surveillance Det. McQuown sighted a portion of the 1965 Chevrolet truck as well as the bed of the 1970 Chevrolet truck. The 1965 Chevrolet truck was found on the farm where the petitioner's son-in-law resided and which was owned by the petitioner. (Farm #2). The bed of this truck had been removed and partly buried by the appellant on the third farm owned by him. Farm #3). (Res. App. 10a-11a). The bed and truck were subsequently identified as that belonging to Alton Miller (Res. App. 102a-103a). The bed of the 1970 truck was discovered on the farm at which the petitioner resided (Farm #1).

When Det. McQuown arrived at the petitioner's residence (Farm #1) on December 12, 1970, he discovered a portion of the truck bed of the 1965 Chev-

rolet truck on fire. At this time they entered into a discussion during which the petitioner told Det. McQuown that he knew the tobacco and truck were stolen. (Res. App. 28a-37a). Furthermore, the petitioner told McQuown that there were a number of stolen cattle grazing nearby on his farm and that there was additional stolen tobacco, the location of which he would reveal on Monday, December 14, 1970. (Res. App. 36a-42a). The petitioner subsequently denied ever having made these statements to Det. McQuown. Following this conversation, Det. McQuown took the petitioner to the State Police Post in Elizabethtown, Kentucky where he was fingerprinted, photographed and then released. The cattle were subsequently identified as those which were stolen from Mr. Parker. (Res. App. 97a-99a).

On December 14, 1970, the appellant took Det. McQuown to a tobacco warehouse at Greensburg where he had previously taken some of the stolen tobacco. This tobacco was subsequently identified along with that located in the barn at the appellant's farm (Farm #1) as that which was stolen from Mr. Albert Parsley. (Res. App. 87a-90a).

During his trial, the petitioner testified that his only connection with the two trucks was through a Mr. James Steele who he knew only on a business basis, over a period of several months. However, neither the Commonwealth nor the petitioner was able to find or produce Mr. Steele as a witness at the trial. The petitioner also testified that although he saw the cattle on his farm, he assumed that they had merely

roamed over from an adjoining farm and was not aware they were stolen. In regard to the 1965 truck, the appellant testified that it was found on one of his farms (Farm #2) where he kept junked vehicles, and that his fences were down in the proximity of where this truck was found and there were tire marks leading in a direction of those vehicles. He testified that he was unaware that there was stolen tobacco in the barn. He also denied knowledge of the truck and its stolen nature. However, Det. McQuown testified that the appellant told him that a Mr. Mouser brought the truck to appellant's farm and appellant cut part of the truck into pieces and buried it. (Res. App. 33a-34a).

As previously noted, the jury returned a verdict of guilty on all four counts and these convictions were thereafter affirmed by the Kentucky Court of Appeals. This petition for writ of certiorari now results.

ARGUMENT

I.

THERE WAS NO VIOLATION OF THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION UPON THE GROUND THAT THE PROSECUTION ALLEGEDLY FAILED TO PROVE AT TRIAL AN ESSENTIAL ELEMENT OF THE OFFENSE CHARGED.

In his appeal to the Kentucky Court of Appeals the petitioner vigorously contended that the Commonwealth failed to prove that the 1970 Chevrolet truck had been stolen from its lawful owners. The foregoing contention was not cloaked at that time with the additional contention of a denial of due process as guaranteed by the 14th Amendment. The respondent respectfully disagrees with the petitioner's argument as is now presented to this Court.

The petitioner was convicted, in a jury trial, of four counts of knowingly receiving stolen property, as denounced by KRS 433.290. The second count of which he stood convicted involved his knowingly receiving a 1970 Chevrolet truck which had been stolen from its lawful owners. On his appeal in state court, he asserted that the Commonwealth's evidence failed to establish that the truck was taken as a result of a larceny. He concluded that an essential element of the offense of knowingly receiving stolen property had not been established. However, the Kentucky Court of Appeals in rejecting this argument stated that, "While the rental company may not have been

aware that the truck had, in fact, been stolen, the jury could infer from all the evidence that such was the case. They did so, and the evidence supports the verdict." (Petitioner's Appendix 1a-2a). The respondent now raises this same issue, but for the first time in the guise of a violation of his right to due process of law as guaranteed by the 14th Amendment. The respondent respectfully disagrees.

Under Kentucky law, the elements of knowingly receiving stolen property, as proscribed by KRS 433.290, are the following:

1. Any person who receives stolen property;

2. Knowing it to be stolen;

3. May be convicted although the thief has not;

4. And possession of any stolen property shall be prima facie evidence of guilt;

5. And finally, venue of the offense must be established. (Russell's Kentucky Practice, Vol. I, Part 3, page 20).

Here, as in the appellate court, the petitioner asserts that when the truck was leased from the rental agency it was not established that the leasee had, at that time, the intent of stealing the property. Of course, if he did, a larceny occurred. On the other hand, if the intent to steal was not present at the time the truck was leased but only arose at some subsequent time, a conversion occurred and the property was not

taken by a "larceny." *Fugate* v. *Commonwealth*, 308 Ky. 815, 215 S.W.2d 1004 (1948).

However, the Commonwealth's evidence established that this truck, although leased, was never returned to its rightful owners and would have been used to transport yet other stolen property, i.e. tobacco, cattle, etc. (Res. App. 39a). Furthermore, the truck was taken by the petitioner to a local garage in order that its truck bed be physically altered without the permission of its rightful owners. (Res. App. 37a-38a). Also, before taking the truck from the farm, the petitioner had the bed of the truck removed from the chassis without the permission of its owners. He also placed on the truck Kentucky truck tags from another truck which he did own. He testified that he did this because the truck in question had no tags of its own and he did not want to drive it on public roads without some kind of truck license on it. However, the Commonwealth's evidence established that at the time the truck was located at the garage by police authorities Wisconsin and Oregon tags for that truck were found in its cab along with the rental agreement between the rental company and a Mr. Steel. (Res. App. 26a-28a). Moreover, the truck was found in the possession of the petitioner and thus was prima facie evidence of the petitioner's guilt of knowingly receiving stolen property. *Deskins* v. *Commonwealth*, Ky., 488 S.W.2d 697 (1972), cert. denied 413 U.S. 902 (1973). It was incumbent *upon the petitioner* at trial to establish the lack of guilty knowledge as to the stolen nature of the property involved and that he legally acquired that property. *Combs* v. *Commonwealth*, Ky., 341 S.W.2d 774 (1961).

Also, it isn't necessary to first establish the guilt of the person who actually stole the property or to prove that the petitioner was in any way connected with the larceny. *Logan* v. *Commonwealth*, Ky., 319 S.W.2d 465 (1959). It is only necessary that the gravamen of the offense, receiving stolen goods with the knowledge that they are stolen, be established. *Grider* v. *Commonwealth*, Ky., 479 S.W.2d 11 (1972).

Thus, the respondent submits that the foregoing evidence was more than sufficient for the jury to conclude that the truck had been stolen as a consequence of a larceny and that the Kentucky Court of Appeals was correct in reaching a similar conclusion. In effect, this issue is merely a question of fact to be determined by the jury from the evidence.

Furthermore, the evidence of scienter on the part of the petitioner, as established by the Commonwealth, was sufficient to present a jury question. *Smith* v. *Commonwealth*, Ky., 495 S.W.2d 770 (1973); *Commonwealth* v. *Wallace*, Ky., 486 S.W.2d 61 (1972); *Russell* v. *Commonwealth*, Ky., 403 S.W.2d 694 (1966); *Clatos* v. *Commonwealth*, 298 Ky. 851, 184 S.W.2d 125 (1945).

The only conclusion that can be drawn is that the Commonwealth's evidence did in fact establish that the truck had been "stolen" and thereafter the petitioner did knowingly receive such stolen property. This being so, the petitioner's present contention is completely without foundation both in law and in fact and does not merit the granting of a petition for writ of certiorari. *Henry*

v. *Mississippi*, 379 U.S. 443 (1965); *American Railway Express Co.* v. *Kentucky*, 273 U.S. 269 (1927).

Finally, the petitioner asserts that there is a conflict of decisions concerning the issue at bar and thus certiorari review should be granted. However, for the reasons already given in the jurisdictional statement and in this argument, the respondent submits that there exists no real conflict of decisions in state and/or federal courts pertaining to the issue presented by the petitioner before the Kentucky Court of Appeals or to that issue as it is now presented to this Court with the additional assertion of an alleged denial of the right to due process of law under the 14th Amendment.

ARGUMENT

II.

THE TRIAL JUDGE DID NOT VIOLATE THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION BY FAILING TO GIVE INSTRUCTIONS LIMITING THE PURPOSE FOR WHICH EVIDENCE PERTAINING TO CERTAIN TOBACCO AND A BURNING TRUCK BED SHOULD BE USED.

In his brief before the Kentucky Court of Appeals, the petitioner asserted that portions of the testimony given by a Commonwealth's witness Det. McQuown, referred to crimes committed by the petitioner other than those for which he was standing trial.

Specifically, the petitioner directs the Court's attention to references made by Det. McQuown to certain tobacco found on the petitioner's farm and the burning bed of the 1970 Chevrolet truck. The petitioner now presents this same issue, as in his first argument, in the guise of an alleged violation of his right to due process of law under the 14th Amendment. The respondent respectfully disagrees and submits that perusal of the testimony in question reveals that the references made by Det. McQuown to the tobacco, other than that which was stolen, and to a burning truck bed do not constitute evidence of other crimes. Therefore, it was not incumbent upon the trial judge to give the instruction which the petitioner felt was required and no violation of a federally protected constitutional right occurred.

The testimony as to the burning truck bed merely established the condition of that truck bed as observed by McQuown when he arrived at the farm. The reference to the tobacco did not indicate that it was stolen. McQuown simply testified that other tobacco was found at the farm. No reference was made by Det. McQuown pertaining to the specific offense of arson or to the stolen nature of the tobacco nor were such references stated or emphasized by the Commonwealth or its other witnesses. Therefore, the respondent submits that this testimony did not constitute evidence of other crimes under Kentucky law and no admonition limiting the purpose for its use was required. *Blakemore* v. *Commonwealth*, Ky., 497 S.W.2d 231, 233 (1973). Likewise, the contention as now presented to this Court cannot be a basis for granting re-

view by writ of certiorari since the alleged violation of federal constitutional rights was not presented to the state circuit or appellate courts for their consideration. Moreover, the Kentucky Court of Appeals in its opinion made no mention or reference to the issue as it was then formulated on appeal. However, there exists no rule, statute or case law in Kentucky which requires an appellate court to rule, in its written opinion, upon every ground urged by an appellant in his brief. In any event, this Court will not undertake to review when the court below did not decide. *Walters* v. *City of St. Louis*, supra: *Stembridge* v. *Georgia*, supra. Also, perusal of the testimony of Det. McQuown, in light of the issue as postulated by the petitioner, establishes that no federal question exists which would predicate this Court granting a review by writ of certiorari. Nor is the petitioner's claim as to a conflict of decision on this issue well taken. Simply stated, no grounds exist for the granting of a writ of certiorari upon this issue.

CONCLUSION

The issues presented by the petitioner alleging a denial of federally protected constitutional rights have not been raised in the courts below and thus may not be a basis for the granting of certiorari review. Moreover, the petitioner has failed to meet the jurisdictional requirements of 28 U.S.C. § 1257 (3). Furthermore, the issues presented by the petitioner do not constitute or raise a substantial federal question. Finally, the petitioner has failed to establish that the issues he now presents actually involve any real conflict of decisions between or among other state or federal courts. For the foregoing reasons, the respondent respectfully requests that the petition for writ of certiorari be dismissed.

Respectfully submitted,

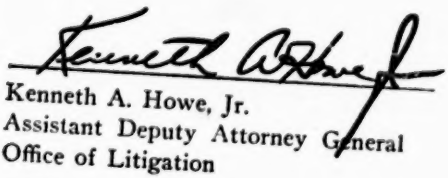
ED W. HANCOCK
ATTORNEY GENERAL

BY: **Patrick B. Kimberlin, III**
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COUNSEL FOR RESPONDENT

PROOF OF SERVICE

I, Kenneth A. Howe, Jr., one of counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of August, 1974, I served the petitioner with Brief for Respondent in Opposition, by placing 3 copies of the same in the United States mail, first class postage prepaid, and addressed to Hon. Frank E. Haddad, Jr., 529 Kentucky Home Life Building, Louisville, Kentucky 40202, Counsel for Petitioner.



Kenneth A. Howe, Jr.
Assistant Deputy Attorney General
Office of Litigation

RESPONDENT'S APPENDIX A

COMMONWEALTH'S EVIDENCE PRESENTED ON DIRECT EXAMINATION AND IN REBUTTAL IN THE HARDIN CIRCUIT COURT DURING THE COURSE OF THE TRIAL OF THE PETITIONER.

[82]

RICHARD McQUOWN, CALLED AS WITNESS ON BEHALF OF THE COMMONWEALTH OF KENTUCKY, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY MR. JAMES:

Q 1 Is your name Richard McQuown?

A Yes.

Q 2 Where do you live, Mr. McQuown?

A 611 Cedar Drive, here in Elizabethtown.

Q 3 And do or not you have any official position with Kentucky State Police?

A Yes, I'm a Detective Sergeant, Kentucky State Police, and I have seven counties assigned to this area.

Q 4 And are you or not stationed at the Elizabethtown post?

A Yes, I am.

Q 5 How long have you been a member of the Kentucky State Police?

Testimony of Richard McQuown

A Fifteen years.

Q 6 In November and December of 1970 were you or not a Detective Sergeant with the Kentucky State Police?

A Yes, sir. I'm in charge of detectives in this area.

Q 7 Detective McQuown, in December of 1970, did or not you conduct an investigation concerning the stolen property, being a truck owned by Alton Miller of Bowling Green, his company?

A Yes, I was. I was informed by Mr. Miller —

MR. HATCHER: We object. Hearsay.

THE COURT: Not what Mr. Miller told you, but to say you received information is all right.

[83]

Q 8 Did or not you receive information from Mr. Miller regarding a truck?

A Yes.

Q 9 And did or not you receive any information from the E-Z-Haul Company regarding a truck?

A Yes, I did.

Q 10 And did or not you receive any information concerning cattle that were owned by Mr. Parker?

A Yes, I did.

Testimony of Richard McQuown

Q 11 And did or not you receive any information about a tobacco crop that was owned by Mr. Parsley?

A Yes, I did.

Q 12 Detective McQuown, will you tell the jury what investigation you made, and what your findings were?

A Well, conducting other investigations resulted in my being in the Sonora area, and I obtained a search warrant after extensive investigation for a barn located in front of the residence of John A. Cardin's house. The search warrant was for tobacco. The search warrant was executed and the tobacco was recovered from the barn and turned over to Mr. Parsley of Edmondson County. This tobacco was roughly 6,000 pounds in weight and it was only a portion of about 10,000 pounds that he had stolen.

MR. HATCHER: Your Honor, we object to that. That's hearsay, and we ask that the jury be admonished not to consider it.

THE COURT: That is hearsay, and the jury will not consider it.

Q 13 You did recover about 6,000 pounds of the tobacco?

A Yes.

Q 14 And that was where?

Testimony of Richard McQuown

[84]

A In the barn located directly in front of John A. Cardin's house, located approximately 200 yards from his house.

Q 15 Go ahead, please, and tell us.

A The tobacco was recovered at night; Mr. Parsley was there with his truck. Detective Chambers was with me, and John A. Cardin was called to the barn and he stated that the tobacco wasn't his. And it was recovered. It was just literally piled up. The tobacco was on tobacco sticks, and was not stacked in the normal method that you would stack tobacco. It was absolutely just thrown down.

Q 16 Now, were any pictures made of that tobacco?

A Yes, there were. I made photographs, and I have them there.

Q 17 How many pictures are there of the tobacco?

A About ten.

Q 18 And do they fairly and reasonably show the tobacco and the condition it was in and where it was?

A Yes, they're pictures of the tobacco located in the barn and also after it was loaded on the truck showing the quantity of it.

Q 19 Do you have those pictures?

A They're by my folder there.

Testimony of Richard McQuown

THE PICTURES REFERRED TO WHERE EXAMINED BY THE COURT AND DEFENSE COUNSEL.

Q 20 Detective McQuown, you have handed me six photographs. Will you file these, marking them for identification Commonwealth Exhibits 1, 2, 3, 4, 5, and 6?

A Yes, sir.

[85]

(The photographs referred to above are filed herewith and made a part hereof, marked for identification, Commonwealth Exhibits 1, 2, 3, 4, 5, and 6.)

Q 21 Now I show you Exhibits No. 2, 4, and 6, and ask you what they represent?

A These are photographs inside the barn located in front of John Cardin's house, and they are of tobacco stacked between the driveway and the wall.

Q 22 Is that the way the tobacco was in the barn?

A Yes.

Q 23 Now I show you 1, 3, and 5, Exhibits 1, 3, and 5, and ask you what they are?

A This is the tobacco after it was loaded onto the truck of Mr. Parsley, and showing the quantity of it.

MR. JAMES: Your Honor, we'd like to exhibit these pictures to the jury.

Testimony of Richard McQuown

THE COURT: Very well.

THE SIX PHOTOGRAPHS WERE EXHIBITED TO THE JURY.

Q 24 Detective McQuown, on what date did you make this search and find the tobacco?

A December the 10th, 1970, at 7:00 p.m.

Q 25 And you say it was in the barn on the premises of Mr. John A. Cardin?

A Yes, it was.

MR. HATCHER: Your Honor, may I approach the bench?

THE COURT: Yes, sir.

THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE OF BUT OUT OF THE HEARING OF THE JURY:

* * *

[87]

that will run through the trial of this case, and that's the reason I'm making the objection.

THE COURT: I understand that there will be some testimony of leasing and such matters as that.

MR. HATCHER: Also, the mere ownership would not be sufficient, I don't think. I think it would probably be incumbent upon the Commonwealth to prove control--possession and control of something; but that

can be taken up later. At this time, I'm just objecting to his testimony as to ownership because it's a conclusion.

THE TRIAL OF THE CASE BEFORE THE JURY CONTINUED AS FOLLOWS:

Q 26 Detective McQuown, do you know where John A. Cardin lives?

A Yes, I do.

Q 27 How long have you known Mr. Cardin?

A Since the middle of 1970. I met him personally in October, 1970.

Q 28 Has he ever himself told you who owns the property where he lives?

A Yes, he owns it.

Q 29 Has he told you that?

A Yes, he did.

Q 30 Now, was he present when the tobacco was found?

A Yes, he was.

Q 31 Now, Detective McQuown, will you tell us about the cattle?

A I have additional information on the tobacco; I'll cover that and then I'll move on to the cattle.

[88]

Q 32 All right. Go ahead.

A This was on December the 10th, at 7:00 p.m. when the tobacco was recovered. The investiga-

tion centered on three days, primarily, the 10th, 11th, and 12th of December, 1970. On the 12th of December, 1970, I went to the John A. Cardin farm again, to the same house; he owns three farms but this is where his residence is located as well as where the tobacco was located. I went to his farm, and at the time there was a fire in progress behind another barn located beside his house; and he was arrested after a short investigation there, and during the arrest he was advised of his rights; and this was two days later after we recovered the tobacco from the barn. At this time, he admitted to me that the tobacco in the barn--he knew who brought it there, he knew it was stolen, and that it was part of other tobacco that was in the barn also, and that he knew where the tobacco came from.

Q 33 Now, you say you advised him of his rights; what rights did you advse him of?

THE COURT: Let me see the attorneys just a minute, please.

COURT AND COUNSEL CONFERRED IN THE PRESENCE OF BUT OUT OF THE HEARING OF THE JURY. THE COURT THEN ADDRESSED THE JURY AS FOLLOWS:

THE COURT: Ladies and gentlemen, we will be out for a few minutes. You may be in recess during that period of time. I'll have Mr. Hugo call you when we return. Remember and observe the admonition heretofore given you.

Testimony of Richard McQuown

* * *

[107]

AT 1:00 P.M., CAME COURT AND COUNSEL INTO OPEN COURT AND THE TRIAL WAS RESUMED AS FOLLOWS:

THE COURT: Are you ready to proceed, gentlemen?

MR. JAMES: Ready, Your Honor.

MR. HATCHER: Yes, Your Honor.

THE COURT: Waive the call of the jury?

MR. JAMES: Waive the call, Your Honor.

MR. HATCHER: Yes, Your Honor.

EXAMINATION OF THE WITNESS, RICHARD McQUOWN, CONTINUED AS FOLLOWS:

DIRECT EXAMINATION BY MR. JAMES:

Q 34 Detective McQuown, you had testified about recovering the tobacco before the adjournment; now did you or not recover the truck that belonged to Alton Miller?

A Yes, I did.

Q 35 Will you tell the jury about how that was found, and where, and what happened in connection with that truck?

Testimony of Richard McQuown

A After making the initial investigation on the tobacco, the following day I went to the airport here in town, north of town, and Ben Floyd flew me over John A. Cardin's farms, and by aerial photography and surveillance, I located a 1965 Chevrolet truck owned by Alton Miller of the Yellow Cab Rental Company in Bowling Green, and the bed off of another truck--the E-Z-Haul truck--on the second farm.

Q 36 Where was the Alton Miller truck?

[108]

A It's either KY 84 or 86 that runs through Sonora; it's about two miles out. Mr. Cardin's son-in-law resides on that farm.

Q 37 What is his name?

A I just know him as Butch.

Q 38 But you do know that he is the son-in-law of Mr. Cardin?

A Yes, I do. The truck could be seen from the highway as well as by airplane, and I have a photograph of the truck from the highway and I also have a photograph of the truck from the airplane. I'd taken a search warrant for the truck, and I went to the farm with the search warrant and recovered it.

Q 39 Now, when you recovered that truck, what condition was it in?

A The truck was a two or two and a half ton 1965 Chevrolet, and the only part of it on the farm

was the cab and the frame — the chassis — and the front and rear wheels. The bed was removed from the truck.

Q 40 Do you know of your own knowledge what type of bed had been on it?

A Yes, I do.

Q 41 What type was it?

A A moving van bed, enclosed body.

Q 42 And did or not you find that bed anyplace?

A Yes, I did.

Q 43 Where was it, Detective McQuown?

A It was behind John A. Cardin's house, right behind the barn next to his house.

Q 44 Was the bed as it was when it was on the truck?

[109]

A No, it had been cut up and partially destroyed, and when I arrived at the farm it was on fire.

Q 45 You say the bed was on fire; was that the entire bed?

A The bed consists of the wooden floor and the metal frame around it, and then the walls and the roof and the doors and the front portion of the bed had been cut away and they were gone; they

weren't even there. The only portion remaining was if it were a flat bed truck that had the walls cut off of it on each side; and it was off of the truck and it was laying on the ground.

Q 46 Now, where was that located, that part of it?

A Well, it was directly behind John A. Cardin's house and barn adjacent to it.

Q 47 Now, was the truck and the part of the body or bed removed from the Cardin place?

A Yes, it was.

Q 48 Where was it taken?

A It was taken to Irvin Miller's Garage just north of town on 31W.

MR. HATCHER: May I approach the bench, Your Honor?

THE COURT: Yes, sir.

THE FOLLOWING REMARKS WERE MADE AT THE COURT'S BENCH, OUT OF HEARING OF THE JURY:

MR. HATCHER: Your Honor, I object to this testimony concerning the burning of the truck, and I again move to discharge the jury because evidence of another offense has been introduced and we are not trying this case; this was severed from the case being tried, and the introduction [110] of this testimony

is prejudicial to the substantial rights of the Defendant.

MR. JAMES: Your Honor, this evidence goes to the condition of the truck, and knowledge and purpose and intent to conceal it, and has nothing to do with any charge of arson.

THE COURT: I think it's competent to show it; let the objection be overruled. But, again, I know you will keep as far away as you can from the other charges.

MR. JAMES: I am trying to, but it all just ties together so if you try to prove one thing you get into maybe something else; but it is all competent.

THE COURT: Well, he's not testifying that there's any charge about that, so I think it's competent. Overrule the objection.

MR. HATCHER: I further object to this witness narrating what had been done. That is entirely a conclusion.

THE COURT: I think that's correct. Let the witness state what he saw.

MR. HATCHER: He can't testify to what had been done to the truck or what had been cut off.

THE COURT: He can only testify to what he saw.

MR. JAMES: All right. I'll ask him in a moment.

Testimony of Richard McQuown

THE QUESTIONING OF DETECTIVE Mc QUOWN THEN CONTINUED BEFORE THE JURY AS FOLLOWS:

Q 49 Detective McQuown, just tell what you saw and not any conclusions you draw from it. Now, I'll ask you when you located the truck and the body, what did you see pertaining to that vehicle and that part of it?

A The bed, the only portion that was there that I saw was [111] the floor and the framework, and of course it was minus the truck which was on the other farm.

Q 50 Did you make a picture of the bed?

A Of the bed?

Q 51 Yes, sir.

A I don't have one, no. It was nearing dark at the time and I didn't have a flash camera.

Q 52 Did you make a picture of the chassis and cab?

A Yes, sir, I did.

Q 53 Now do you have those pictures with you — the ones from the air and the ones from the road — and the pictures of the chassis?

A Yes, sir.

Q 54 Will you hand me those, please?

Testimony of Richard McQuown

WITNESS HANDED PHOTOGRAPHS TO COMMONWEALTH ATTORNEY.

THE COURT: While you are looking at that—The jury will not consider testimony as to what had been done to the bed of the truck; you will only consider testimony as to what this witness actually saw at the scene.

MR. JAMES: Your Honor, may I approach the bench, please?

THE COURT: Yes, sir.

MR. JAMES: Mr. Hatcher?

COURT AND COUNSEL CONFERRED OFF THE RECORD OUT OF THE HEARING OF THE JURY. PHOTOGRAPHS WERE EXAMINED BY THE COURT, AND THE QUESTIONING OF THE WITNESS CONTINUED AS FOLLOWS:

Q 55 Detective McQuown, you have handed me two photographs. Will you file these and make them a part of your testimony marked for identification Commonwealth Exhibits [112] No. 7 and 8?

A Yes, sir.

(Photographs referred to above are filed herewith and made a part hereof, marked for Identification Commonwealth Exhibits No. 7 and 8.)

Q 56 I will show you Exhibit No. 8 and ask you to state what that is a picture of.

Testimony of Richard McQuown

A This picture is of John A. Cardin's what I call the second farm; it's located on either 84 or 86, I don't know which highway that is.

Q 57 Is it a state highway?

A Yes, it's where his son-in-law, Butch, lives, that he owns.

MR. HATCHER: Your Honor, I object to his evidence concerning ownership. It's a conclusion.

MR. JAMES: Your Honor, I might ask him one question.

Q 58 Did or not you get any information from Mr. Cardin, John A. Cardin, as to who owned this particular acreage or farm?

A I came to the tax office and looked up the tax records myself.

MR. HATCHER: Objection, Your Honor.

Q 59 Did Mr. Cardin tell you he owned it?

A Not at that time.

Q 60 Did he at any time tell you?

A Yes, he did.

Q 61 When did he tell you that?

A It was during the course of the investigation after the arrest.

[113]

Q 62 And did John A. Cardin then tell you that this particular place belonged to him?

Testimony of Richard McQuown

MR. HATCHER: We object to the leading, Your Honor.

THE COURT: Don't lead him, Mr. James. He may state if he did tell him or if he didn't.

MR. JAMES: All right.

A Mr. Cardin acknowledged ownership of three farms, and this is one of them.

MR. HATCHER: I didn't hear his answer.

MR. JAMES: He said he acknowledged the ownership of three farms and that this was one of them.

MR. HATCHER: That's a conclusion.

THE COURT: I think it's competent.

Q 63 What type of a picture is that?

A This is a photograph I made from an airplane; the wingstrut is visible. The barn in the center of the photograph has several cars around it and located to the right side of the photograph in the group of cars and trucks is the green '65 Chevrolet truck of Alton Miller's.

Q 65 Can you take a pen and make an arrow pointing to the truck as it appears in the picture?

A I think so. (WITNESS MARKED THE PHOTOGRAPH.) It was much more clear by eyesight than it was by camera.

Q 66 I now show you Commonwealth Exhi-

bit No. 7, and ask you what that is. (WITNESS EXAMINED PHOTOGRAPH.)

A It's a picture of the same truck in the same location taken from the highway with a telephoto lens.

MR. JAMES: Your Honor, we would like to exhibit these photographs to the jury.

[114]

THE COURT: Let them be exhibited.

THE PHOTOGRAPHS REFERRED TO ABOVE WERE EXAMINED BY THE JURY.

Q 67 Detective McQuown, do Exhibits No. 7 and 8 indicate the place reasonably as it appeared when you went there where the truck was located, in position and all?

A Yes, it does.

Q 68 And I believe that you have testified that the truck then was removed to Irwin Miller's Garage?

A Yes, it was.

Q 69 Were there any numbers or identifying marks on the truck?

A Yes, the serial plate was still on it.

Q 70 Do you have that serial plate number?

A Yes, I do.

Q 71 Would you read the number, please, slowly?

Testimony of Richard McQuown

A The serial number is C-6835-N-121628.

Q 72 Now, is the place where the truck was located in Hardin County?

A Yes, it was.

Q 73 And on what date did you locate that truck?

A On the 11th of December, 1970.

Q 74 Now, on that same date did you locate the other truck?

A Yes.

Q 75 Where did you locate it and what part did you locate?

A That same morning, December the 11th, at about eight o'clock in the morning, I went to Edlin's Machine Shop after receiving a phone call, and found a 1970 green Chevrolet truck with no body other than the cab, and no [115] bed on it, in other words; it was a truck and chassis, dual axles on the rear and single axle in the front, and it was being worked on. A portion of the frame had been cut out of it and extended. This truck had a 1970 Kentucky Farm Tag on it, which I have here.

Q 76 You have the tag there?

A Yes, I do. I made photographs of the truck and secured the tag and went through my normal procedure of processing the truck.

Testimony of Richard McQuown

Q 77 Now, did that truck have a serial number on it?

A Yes, it did.

Q 78 Do you have that number?

A Yes, sir.

Q 79 Will you read it, please?

A C-E-530-P-157436.

Q 80 Now, you referred to a license tag that was on the truck.

A Yes, sir.

Q 81 Do you have that tag?

A Yes, it's in my folder. (WITNESS REMOVED TAG FROM FOLDER AND HANDED IT TO MR. JAMES.)

Q 82 Detective McQuown, you have handed me a metal plate or an automobile or truck license tag bearing the number of A73-853. Is that the tag?

A That is the tag; I removed it from the truck myself, while it was parked at Edlin's Machine Shop inside.

MR. JAMES: Your Honor, we'd like to file that as Commonwealth Exhibit No. 9.

THE COURT: Let it be filed.

[116]

(The metal plate referred to above is filed here-

with and made a part hereof, marked for identification Commonwealth Exhibit No. 9.)

Q 83 Now, did or not you find any other license tags?

A Yes, I found two other tags in the cab of the truck on the floor boards.

Q 84 And do you have those tags?

A Yes, I do.

Q 85 Will you remove them from the envelope? (WITNESS REMOVED TAGS FROM ENVELOPE.) (TAGS WERE SHOWN TO THE COURT AND TO DEFENSE COUNSEL.) Detective McQuown, you have handed me two metal plates appearing to be license plates for the state of Oregon, bearing the number T297629, is that correct?

A Yes, sir.

Q 86 There also appears written on each of the tags the letters and numbers either BO or Bzero 4836, is that correct?

A Yes, sir, it is. That's what's commonly used as a--

THE COURT (Interrupting): Not what it's commonly used as, but was that on there when you found it?

A Yes, it was.

Q 87 It was on there when you found them?

A Yes, it was on there.

Testimony of Richard McQuown

Q 88 Will you file these two plates as part of your testimony, marking them for identification as Commonwealth Exhibits No. 10 and 11?

A Yes, I will.

(The metal plates referred to above are filed herewith and made a part hereof, marked for identification as Commonwealth Exhibits No. 10 and 11.)

[117]

Q 89 Where were these two plates?

A On the right front floor board of the cab of the truck.

Q 90 And the Kentucky plate was where?

A On the back of the truck, mounted.

Q 91 Now, was there any bed or body on that truck?

A No, there was not.

Q 92 Did or not you find, in your investigation, the body or bed of that truck?

A Yes.

Q 93 Tell the jury about finding that, and give its location, and when you found it.

A At the same time, while flying over John Cardin's farm, what I call the Number Three farm which is located approximately three or four miles from his residence, to the west —

MR. HATCHER (Interrupting): Your Honor, I

object to his testimony concerning ownership. I think he might state where John lived, but as far as ownership I don't think he can state that.

THE COURT: I think he may state where he found them, and he has previously stated that it was acknowledged —

MR. HATCHER: I object to his testimony to ownership as incompetent. He has referred to John Cardin's farms over and over.

MR. JAMES: He has said several times that —

THE COURT (Interrupting): He has stated that Mr. Cardin said they were his farms. Overrule the objection. But as to what he refers to as Number Three Farm — he should state only where the farm was.

A The farm is located about three miles west of John Cardin's residence, toward Spurrier, Kentucky — in that area.

[118]

Q 94 Did you make any pictures from the air or on the ground of the '70 Chevrolet and the body?

A Yes, I photographed the truck at the— and removed some items from it while it was at Edlin's Machine Shop, and then after leaving there I took the plane and flew over the farm and photographed the bed to this truck.

Q 95 Do you have those photographs?

A Yes, I do.

Testimony of Richard McQuown

(MR. JAMES RECEIVED PHOTOGRAPHS FROM WITNESS, THEN SHOWED THEM TO DEFENSE COUNSEL AND THE COURT.)

Q 96 Detective McQuown, you have handed me seven photographs. I'll ask you if you will file these as part of your testimony, marking them for identification as Commonwealth Exhibits No. 12 through 18?

A Yes, I will.

(The photographs referred to above are filed herewith and made a part hereof, marked for identification as Commonwealth Exhibits No. 12, 13, 14, 15, 16, 17, and 18.)

Q 97 Now I show you Exhibits No. 12, 13, 14, and 15. Will you state what they are pictures of, by whom made and from where?

A I made these pictures from an airplane, and they are — while I was circling the one spot which is centered. They are from different angles, showing the same truck bed, in location to where the buildings are. I marked each one of them with an arrow, showing where the bed is. The bed was clearly visible to me, being the color white on the sides. The back was not in view due to trees. The front portion of the bed was green, and on the top [119] front corners of both sides of the bed on the white sides were two black elephants on each side.

Q 98 Were there any other colors or markings of the bed on the back?

A No, they'd been removed.

MR. JAMES: Your Honor, we'd like to exhibit No. 12, 13, 14 and 15 to the jury.

THE COURT: You may do so.

COMMONWEALTH EXHIBITS NO. 12, 13, 14, AND 15 WERE INSPECTED BY THE JURY.

Q 99 Detective McQuown, I now show you Exhibit No. 17, and ask you what that is a picture of?

A This is a photograph of the rear of the truck in Edlin's Machine Shop displaying '70 Kentucky Tag A73-853. It was a 1970 Chevrolet E-Z-Haul rental truck.

Q 100 Does or not that photograph show anyplace on the frame where any work or changes had been made?

A Yes, up near the cab there's a dark section that has been added into the bed.

Q 101 Is that a place that you can mark, indicating it?

A Yes, I can.

Q 102 Would you put an arrow there, please?

A Yes. (WITNESS MARKED PHOTOGRAPH.) I put a line on each side of it, on both sides.

Q 103 Now, I show you Exhibit No. 18 and ask you what that is a picture of?

Testimony of Richard McQuown

A This is a photograph of an old model Chevrolet flat bed truck on John Cardin's residence farm at his main drive entrance, parked on the right-hand side, and it shows no [120] tag on the vehicle. The tag —

Q 104 (Interrupting) Just — Was there any tag on this vehicle?

A No, there was not.

Q 105 Now, I show you Exhibit No. 16 and ask you what that is a photograph of?

A That is a photograph of the two license plates, the Wisconsin and the Oregon plates, on the floor board of the '70 Chevrolet truck at the Edlin Machine Shop.

Q 106 Now, is that the position the plates were in when you found them on the floor board?

A No, they were laying there; I had to prop them up so they would photograph.

Q 107 But they were right on the floor board?

A Right in the immediate area, yes.

Q 108 Was that in the open, or were they concealed?

A No, they were in the open but they were on the floor boards.

MR. JAMES: Your Honor, we'd like to exhibit these pictures to the jury.

THE COURT: You may do so.

COMMONWEALTH EXHIBITS NO. 16, 17, AND 18 WERE INSPECTED BY THE JURY, AFTER THEY HAD FIRST BEEN SHOWN TO DEFENSE COUNSEL AND THE COURT.

Q 108 Detective McQuown, I show you a paper which has some carbons in it and which has a number of A1452335 on it, and ask you if you have seen that paper before?

A Yes, I removed this rental contract from the cab of the truck. It was laying on the dash. It was in this small folder here. It is dated December the 5th, 1970, and it [121] shows where the truck was rented from, and the time it was rented, the miles on the truck when it left; and it shows the license plate number, which is the T297629 Oregon tag and it matched the vehicle that it was in.

Q 109 Now, was that in open view in the cab?

A Yes, it was laying on the dash, in the folder.

Q 110 In this folder?

A That's right.

Q 111 Now, will you place it in the folder just like it was?

A Yes, sir. (WITNESS PLACED PAPER IN THE FOLDER.)

Q 112 And does or not the folder have the letters E Z and Haul underneath?

A Yes, it does. And they show the black

elephants that I described on the side of the truck bed.

Q 113 Now, will you file the folder and the rental contract that you found in the cab of the truck?

A Yes.

Q 114 And marking them for identification Commonwealth Exhibits No. 19 on the folder and 20 on the rental agreement?

A Yes.

(The folder and rental agreement referred to above are filed herewith, marked for identification Commonwealth Exhibit 19 (folder) and 20 (agreement).)

MR. JAMES: Judge, we'd like to exhibit these two exhibits to the jury.

THE COURT: Very well.

THE JURY EXAMINED COMMONWEALTH EXHIBITS 19 AND 20.

Q 115 Detective McQuown, did or not you say the two trucks, a portion of the body of the bed of one and the body of the other, were found on December the 11th?

[122]

Q 116 Now, were those places where these vehicles or parts of vehicles were found all in Hardin County, Kentucky?

A Yes, they were.

Testimony of Richard McQuown

Q 117 Did or not you remove the E-Z-Haul truck and body to anyplace?

A Yes, sir.

Q 118 Where was that taken?

A I had it towed to Irwin and Miller.

Q 119 Now, that is the same place you took the other truck?

A Yes, sir. It required a low-boy to carry the beds in.

Q 120 Now, can you tell us what day of the week December the 10th was?

A Yes, sir; it was Thursday.

Q 121 And Friday would be the 11th?

A Yes, it was.

Q 122 Did or not you do anything further in this matter following December the 11th?

A Following December the 11th?

Q 123 Yes.

A Yes, December the 11th was when I went to the John A. Cardin residence, as I explained about where the fire was — December the 12th; I'm sorry. Saturday, after December the 11th.

Q 124 Then it was on December the 12th that you went there to the residence?

A Yes, it was.

Q 125 Now, what did you do, and what did you see, and what did you hear on that occasion?

Testimony of Richard McQuown

A As I arrived at John A. Cardin's residence and began to [123] turn into the driveway, I met a green Ford pick-up truck driven by Williams, an employee of John A. Cardin's, coming out of the driveway. I stopped him and obtained his identification, and I looked in the truck bed and there were some heavy tools in the rear of it. I sent him on back to the garage and told him I'd contact him later. As I proceeded into the driveway, John A. Cardin was walking from his house and barn area out toward the road to meet me. He confronted me about half-way up the driveway and immediately behind him was a car, an Oldsmobile, following him out being driven by one white male. I asked John A. Cardin, "What's on fire?" and he said, "I'm just burning an old truck bed back here," and I asked him if he cared if I looked at it, and he said, "No, I guess not." He walked back there with me. At the fire, which smoke was coming from, was the Alton Miller lower section of the truck bed. It was on fire at the time. It was covered with some sort of fuel oil or kerosene —

MR. HATCHER (Interrupting): Your Honor, we'd like to object to him saying what —

THE COURT (Interrupting): Objection sustained. That's right. You may state what you saw — not what it appeared to be or anything else — just what you saw.

A (Continuing): There was liquid on the bed and it was on fire.

Testimony of Richard McQuown

Q 126 What was then done, Detective McQuown?

A Well, I examined the truck bed. The walls had been cut from it by —

[124]

MR. HATCHER (Interrupting): We object.

THE COURT: Sustained. Just testify to what you saw, and not what had been done because you weren't there.

A (Continuing) The supports on the top portion of the bed had been cut by torch or burned —

MR. HATCHER: Your Honor, we object and I move that this witness be admonished.

THE COURT: Sustained. If the upper supports were not there, Officer, just state that they were on there.

A (Continuing) They were removed.

Q 127 Was there any conversation with Mr. Cardin after that, Officer?

A Yes, there was. He was placed under arrest.

Q 128 Wait just a minute, now. Where did that conversation take place?

A It took place behind the barn immediately adjacent to his house.

Q 129 Now, on that occasion and at that place, what occurred? What did you do?

Testimony of Richard McQuown

A Well, after observing the truck bed — John A. Cardin was there with me — I immediately recognized the truck bed, and I placed him under arrest and advised him of his rights.

Q 130 When you advised him of his rights, what rights did you advise him of?

A That he had a right to remain silent and that anything he said could be used against him in a court of law; I advised him he could have an attorney with him before any questioning if he desired one, and I advised him [125] that if he could not afford an attorney, the Court would appoint one for him; and I asked him if he understood those rights, and he stated that he did, and he agreed to questioning.

Q 131 Were questions then asked him after that?

A Yes, they were.

Q 132 And did or not he answer them?

A Yes, he did.

Q 133 Did he at any time refuse to answer or ask for an attorney?

A No, he did not.

Q 134 And did he appear to understand his rights?

MR. HATCHER: We object.

THE COURT: Sustained. Not how he appeared.

Testimony of Richard McQuown

Q 135 Did he state that he understood his rights?

A He acknowledged that he did understand his rights.

MR. HATCHER: Your Honor, I object to this questioning unless he can repeat the conversation if he remembers the conversation. I'm objecting to him narrating, and drawing his conclusions to what the man did or what he said.

THE COURT: Well, he stated that he had a conversation with him. I think you might just have him repeat the conversation, Mr. James.

MR. JAMES: That's what I'm trying to do, Your Honor.

Q 136 Now, what took place and what was said as near as you can in the words used by you and Mr. Cardin; don't give your interpretation of it, but just tell us what was said.

A Well, I discussed with him the truck bed that was there —

[126]

MR. HATCHER: We object.

THE COURT (Addressing witness): Well, what was said about the truck bed?

A He advised me that the truck bed was brought there by another person, and that he was removing it, dismantling it, and burning it.

MR. HATCHER: I'm not objecting to him relating the conversation; I'm objecting to him drawing conclusions as to what he was advised or what he was not advised. If he has a conversation, then I believe he can relate it, but he cannot give a narration or a summary of what anybody told him or what he told anybody else.

THE COURT: Overruled. I understood him to say that this was part of the conversation: that Mr. Cardin told him this.

Q 137 Is or not that what Mr. Cardin told you?

A Yes, he told me that he cut the truck bed up himself; that he'd carried part of it away by truck to another location.

Q 138 Now, what else, if anything, did he tell you?

A He told me who brought it there.

Q 139 Tell us what he said, in his words.

A He told me that Joe Mike Mouser brought the truck bed there and that he'd brought the tobacco in the barn there to the farm, and that he himself had cut this truck bed up and removed portions of it to the other farm to the west, and that he'd buried it — had a bulldozer there to bury it — and I asked him if anyone else with with Joe Mike Mouser at the time and he said he didn't know their names but there were others there at the time. I asked him [127] about Mr. Alvey, who was present, if he was

there at the time during which any of these vehicles were brought —

MR. HATCHER: Your Honor, I submit that he is narrating, not testifying to the conversation.

THE COURT: Just testify to what the conversation was, Officer.

MR. HATCHER: If you overrule my objection, I can't stop him from going ahead and narrating it; but I want the Court to know it's over my objection.

THE COURT: Officer, can't you just testify as to the conversation between you and Mr. Cardin?

WITNESS: I'll try, but it's difficult.

Q 140 As best you can, just repeat what he said; not a narrative, but his words as best you can.

A I asked him if he would come to the State Police Post with us and give a statement in writing, and he said, no, he'd rather not at that time. And then I asked him if he would testify against the people that brought it there, and he said, no, they'd kill him. And I said, "Is that Joe Mike Mouser?" and he said "Yes, and others." He said, "You know who they are," and I asked him about the tobacco in the barn, as I mentioned, and he answered that some of the tobacco, he knew, was brought there by Joe Mike Mouser and he related the incidents of what Mouser had told him had happened when he stole some of these items, the difficulties he had in getting a truck stuck

while he was stealing some tobacco, and he had to steal a tractor to take it out and pull it away and got it out of the mud and he brought the tobacco on to the barn; he told me about the cattle; just before we left, I asked [128] him if there was anything else on the farm that was stolen that we could recover today so we wouldn't have to be coming back time and time again with search warrants, and let's get this over with once and for all; and he said, "Yes, there's some cattle here; some Holstein cattle, about twenty or twenty-five." He showed me the cattle and he stated that he knew they were stolen. Joe Mike Mouser had told him that they stole the cattle near Park City, Kentucky, and that the tail-gate come out of the truck and some of the cattle fell out on the highway and they lost a bunch of them —

THE COURT (Interrupting): I don't think what happens before they get there is competent; just start with what was on the farm.

Q 141 Just tell what he told you.

A That's what he told me.

Q 142 And did or not you ask him anything about the trucks?

A Yes, I did.

Q 143 And what did he say?

A He said he didn't know how those trucks got there at that time; then later he changed his story during the conversations, and admitted —

MR. HATCHER: "And then later he changed his story." If that's not editing, I don't know what it is. I'm objecting to all of this.

THE COURT: Very well. Then did he tell you something else later?

WITNESS: This conversation lasted about an hour and a half.

THE COURT: Well, if he told you something different, state what it was that he told you different.

A (Continuing) All right. He told me he didn't know any- [129] thing about the trucks at first, and then he admitted that he did know something about the trucks.

Q 144 What, if anything, did he say then about the trucks?

A He told me that he took the bed portion of this truck that was on fire there and had buried it on the back of one of his farms with a bulldozer; he had a man to do this. And that the E-Z-Haul truck bed had been brought in there after he built a bridge across the road there — the bridge had been washed out — and he had a bulldozer man in there to do that, so he just had him to cover that bed up at the same time. And then when the bridge was built, this truck bed was brought in there. He said about the E-Z-Haul truck that was brought to Edlin's Machine Shop, he told me that he called Edlin's and told them he was

bringing a truck up there and that he was going to have it worked on for a man that brought it in, a customer; and he told me that he drove it there himself to Edlin's Machine Shop.

Q 145 Did he or not tell you of any use of that truck by him?

A Yes, he did.

Q 146 What did he say?

A He told me that he hauled some of the tobacco that belonged to Albert Parsley that we've been discussing to a tobacco barn, and he's show me where that tobacco was Monday — this was on a Saturday, the 12th of December, 1970; he indicated that on the 14th, he'd tell me where that tobacco was, that he wanted some time. I insisted, two or three different times, to tell me where it was for fear it would be lost; and he refused, and said, [130] "I'll just wait until Monday, just take my word for it and I'll tell you where the tobacco is Monday," So I had no other choice. He told me he took the tobacco to the warehouse —

Q 147 (Interrupting) Now, was this on Monday that he told you this?

A Yes, on Monday. He told me while we were standing there; there was a flat bed off of another truck laying beside the buring one, and he said, "I hauled tobacco on that bed right there."

Q 148 Did he say what vehicle the bed was used on?

A Yes.

Q 149 What vehicle was it?

A They had put that black wooden cattle bed, flat, on the Alton Miller 1965 Chevrolet truck which was in the telephoto lens photo, and they they'd removed that bed from it and they were going to take that bed because that truck was breaking down all the time on these trips these fellows in it was involved in; it wasn't good enough for them so they wanted a good truck, and so that's why they were going to put the bed on the 1970 new Chevrolet E-Z-Haul truck, and that's why the frame was being lengthened.

Q 150 Now, to go back to the tobacco, Detective McQuown. Did or not Mr. John A. Cardin tell you where a part of the Parsley tobacco was taken?

A On Monday?

Q 151 Yes.

A Yes.

[131]

Q 152 Where did he say it had been taken?

A He wouldn't tell me until we got ready to leave. He wanted to take me there. Detective Chambers was with me at the time, and we went to John Cardin's house in the afternoon about three o'clock, on Monday, December the 14th, 1970, and there I met Mr. Parker, the owner of 24 head of Holstein cattle which were returned to him; and after the truck was loaded and they left with the cattle, he

then drove his Lincoln car with his wife, and Detective Chambers and Detectve Spurrier were with me, and we proceeded to Greensburg, Kentucky, and I followed him and he drove his car. At Greensburg, Kentucky, we pulled up to a warehouse — tobacco warehouse — and went inside and he said, "This is where I brought it." I didn't know until we got there where it was going to be.

Q 153 Now, on Monday — was that the first day after December the 12th when the cattle were mentioned — was that the first day you saw the cattle?

A No, December the 12th he told me about the cattle.

Q 154 Where were the cattle?

A There on the farm with us.

MR. HATCHER: Mr. James, would you approach the bench with me?

COURT AND COUNSEL CONFERRED OFF THE RECORD OUT OF THE HEARING OF THE JURY.

Q 155 Detective McQuown, so that the jury and the Court and everybody will understand, you were at Mr. Cardin's on December the 12th, and that was a Saturday?

A Yes.

Testimony of Richard McQuown

[132]

Q 156 Now, did or not on that date you learn anything about the cattle?

A Yes, I did.

Q 157 From whom did you learn it?

A From John Cardin.

Q 158 Now, what was said and who said it?

A I asked John Cardin if there was anything else on the farm that was stolen, that we would get this over with now and not have to keep coming back and get search warrants for and everything, that we'd like to clear it up now; and he said, "Yeah, there's some cattle here; twenty or twenty-five head of them, Holsteins."

Q 159 Now, did you see those cattle on that date?

A Yes, I did.

Q 160 Now, on Monday, the 14th, you say you went back?

A Yes, I did.

Q 161 And who was there with you on that date?

A Detective Chambers and Mr. Parker, the owner of the cattle.

Q 162 Now, were any photographs made of the cattle?

A Yes, there were.

Testimony of Richard McQuown

Q 163 Do you have those photographs?

A Yes, they were taken by Detective Chambers, but they're here.

Q 164 Will you hand me the photographs, please?

A Yes, sir.

THE PHOTOGRAPHS WERE HANDED TO THE COMMONWEALTH ATTORNEY, WHO THEN SHOWED THEM TO DEFENSE COUNSEL AND THE COURT.

Q 165 You have handed me eight photographs which I believe you said Detective Chambers made.

[133]

A Yes, sir.

Q 166 Were you present when these were made?

A Yes, sir, I was.

Q 167 And do or not they fairly and reasonably represent the area and the things that they were photographs of?

A Yes, they are photographs of the barn that I've been describing as being adjacent to the house.

Q 168 Now, will you file these eight photographs as part of your testimony, marking them for identification Commonwealth Exhibits Nos. 21 through 28?

A Yes, sir.

Testimony of Richard McQuown

(The eight photographs referred to above are filed herewith and made a part hereof, marked for identification Commonwealth Exhibits No. 21, 22, 23, 24, 25, 26, 27, and 28.)

Q 169 Now, in these pictures there appears to be a truck in three of the photographs. Whose truck is that?

A Mr. Parker had a driver and a truck come to get the cattle.

Q 170 That truck is not involved in any way in this?

A Just to remove the cattle from the farm and remedy the situation.

Q 171 Now, on what place were the cattle located?

A As you turn in John Cardin's driveway at his residence farm, this barn is off to the right side of the driveway and his house is off to the left side.

Q 172 And that is in Hardin County, Kentucky?

A Yes, it is.

MR. JAMES: Judge, we'd like to exhibit these pictures to the jury.

[134]

THE COURT: Very well.

COMMONWEALTH EXHIBITS NO. 21, 22, 23, 24, 25, 26, 27 AND 28 WERE INSPECTED BY THE JURY.

MR. JAMES: You may ask him.

CROSS EXAMINATION BY MR. HATCHER:

Q 173 Mr. McQuown, you have testified here both this morning and again this afternoon that you arrested John Cardin at his place there on December the 14th, 1970; is that right.

A Yes, sir.

Q 174 Now, when you arrested him, did you bring him to jail?

A No, sir.

Q 175 Did you take him before a county judge or a magistrate and have him make bond?

A No, sir.

Q 176 What did you do with him?

A Went to the State Police Post.

Q 177 Did you have charges preferred there against him?

A I didn't have any warrants at that time, and it was night; I photographed him and fingerprinted him and processed him as we normally do.

Q 178 And then what.

A Advised him to appear back in Court Monday morning. He wasn't going anywhere.

Q 179 Now, you're telling this jury, are you, that this man had done something bad enough that

you went there to his [135] home and arrested him, but still did not take him to jail or did not put him under bond and did not take him before a county judge or a magistrate — is that what you are saying?

A That's what I'm saying, yes, sir.

Q 180 So you thought he'd done something bad enough that you could arrest him right there in his home, and yet you preferred no charges against him.

A I did prefer those charges.

Q 181 Well, did you put him under bond?

A Yes, sir, Monday morning.

Q 182 You didn't that night?

A I don't put him under bond; I —

Q 183 (Interruptnng) You didn't take him to jail?

A I served the warrants on him Monday morning, December the 14th.

Q 184 Well, now, if you wanted the man in Court Monday morning, couldn't you have just told him to come to Court? You didn't have to arrest him, did you?

A I don't understand exactly what you mean.

Q 185 You say you arrested him, and then you turned him loose.

A I summoned him to be in Court.

Q 186 Well, there wasn't any use in arresting him if you was going to turn him loose, was there?

A I had to fingerprint him and process him; yes, sir, I have those regulations I have to follow.

Q 187 The truth about it is you wanted to interrogate him, didn't you?

A No. sir.

[137]

Q 188 You wanted to cross examine him, didn't you?

A No, sir, I'd already done that.

Q 189 How long have you been on the State Police?

A Fifteen years.

Q 190 Fifteen years. And you sit over there with the Commonwealth Attorney and advise along with him about how to prosecute this case, and what evidence to introduce, don't you?

A No, I've been right here.

Q 191 And you've been on the law enforcement end of this long enough to know what evidence you have to have to get a man convicted, don't you?

A Yes, sir.

Q 192 And you see that that evidence is furnished when you get on the witness stand, don't you?

A That's my duty.

MR. JAMES: Your Honor, we object to his in-

ferring that he does something wrong in performing as an officer.

THE COURT: Well, he may interrogate him about what his work is and what is involved.

Q 193 Now, Mr. McQuown, you have testified at length here about the conversation with Mr. Cardin, and that was in December of 1970; is that right?

A Yes, sir.

Q 194 And can you remember word for word every word that was said during the conversation?

A No, sir.

Q 195 Then you don't know all that was said, do you?

A I recall most of the conversation.

[137]

Q 196 What you are doing is drawing your conclusions, and your opinions, on the substance of that conversation, aren't you?

A No, I am not.

Q 197 Well, you don't remember it word for word, do you?

A It was about an hour and a half long; I don't believe anyone could do that.

Q 198 That's just what I'm getting at. You do not remember word for word what was said?

A I told you no.

Testimony of Richard McQuown

Q 199 All right. And what you are saying is your opinion and your recollection of what was said?

A That's the only thing I can go on, is my recollection, yes, sir.

Q 200 And your opinion, your summary of what was said.

A Not my opinion — my recollection.

Q 201 But you're not saying you remember all of it?

A No, sir, I'm not saying that.

Q 202 You could have conveniently left out some out it, couldn't you?

A I have left out some of it.

Q 203 That's just what I thought.

MR. JAMES: Your Honor, might I approach the bench?

THE COURT: Yes, sir.

COURT AND COUNSEL CONFERRED OFF THE RECORD OUT OF THE HEARING OF THE JURY.

Q 204 Now, Mr. McQuown, you say you had been investigating this case for some several days, had you?

[138]

A Yes, sir.

Testimony of Richard McQuown

Q 205 And from your testimony here, you say you have found a number of offenses which you are accusing Mr. Cardin of having committed?

A Yes, sir.

Q 206 And you were undertaking to build up a case and get a case that would stand up in Court against him, weren't you?

A Yes, sir.

Q 207 And you had to depend on statements that he made to prove a case against him, didn't you?

A No, sir, not only that.

Q 208 You knew that you had to prove knowledge that property was stolen to make out a case against him, didn't you?

A It will be proven it was stolen.

Q 209 I say, you knew you had to prove that?

A Yes, sir, I know the elements.

Q 210 Now, did you get him to sign a statement as to these things you testified about?

A No, sir.

Q 211 Don't you know that the written statement, word for word, signed by a man, is the best evidence?

A No, sir.

Q 212 It's not?

A No, sir, not the best; it helps.

Testimony of Richard McQuown

Q 213 When the grand jury returns an indictment, the foreman signs it, doesn't he?

A I assume so. I've never been there.

Q 214 When the Court issues a warrant, it's signed, isn't it?

[139]

A I assume so, yes, sir.

Q 215 Your marriage license was signed, wasn't it?

A Yes, sir.

Q 216 In fact, deeds are signed?

A Yes, sir.

Q 217 So this evidence that you've accumulated to convict this man on, you didn't think it was important enough to get it written down and signed, is that right?

A He wouldn't sign it.

Q 218 He would not sign it?

A That is correct.

Q 219 All right, Mr. McQuown; you know how to write, don't you?

A Yes, sir.

Q 220 Did you have any paper and pencil with you?

A Yes, sir.

Q 221 Why didn't you take out that paper and pencil and write down what he was telling you, so you'd have it right here today?

A I didn't have the time.

Q 222 You didn't have time. You'd rather depend upon what your memory of it was, is that right?

A No, sir, that's all I had to depend on.

Q 223 Now, let me ask you another question. Don't the Kentucky State Police have recording devices?

A Yes, they do.

Q 224 And haven't you been on the force long enough that you know that you can take a recording of a conversation with somebody.

[140]

A Yes, I do.

Q 225 Did you make any recording of this conversation with John A. Cardin on this occasion?

A No, sir, I didn't expect to need a recorder when I ran up on the fire.

Q 226 You didn't take it down in writing, you didn't record it, but you're coming before this jury and editing what he told you, is that right?

A No, sir.

Q 227 Now, this tobacco —it was in a barn, was it?

A Yes.

Q 228 And do you know who had control of that barn?

A I think I do, yes.

Testimony of Richard McQuown

Q 229 Do you know Edward T. Jarrett?

A I've heard the name. I've checked it considerably.

Q 230 Didn't Mr. Cardin here tell you then and there that this barn was rented to Edward T. Jarrett, and that Edward T. Jarrett had exclusive control and possession of it?

A He told me that one time.

Q 231 He told you that down there then, when you found that tobacco, didn't he?

A Yes, at that time he did.

Q 232 Then if there was tobacco in that barn that was rented to Edward T. Jarrett, it was in the possession of Edward T. Jarrett and not John A. Cardin, wasn't it?

A That's what he told me December the 10th, but December the 12th, he told me otherwise.

Q 233 That December the 12th was when you did not write it down, you did not make a recording or anything like that, [141] and you don't remember it word for word — that was the time, was it?

A No; no; and yes; you asked three questions.

Q 234 Now, you say he took you over to Greensburg where he told you there was some more tobacco that he'd hauled over there?

A Yes, he did.

Testimony of Richard McQuown

Q 235 Did he tell you that he'd hauled that tobacco over there for this Edward T. Jarrett?

A No, he did not.

Q 236 That tobacco was claimed by somebody from down at Cave City was it?

A Yes.

Q 237 Or Park City. Park City and Cave City are right close to each other, aren't they?

A Four or five miles, yes.

Q 238 And that's where Edward T. Jarrett's from — Route 3, Cave City, isn't it?

A That's an address given for a name of a person.

Q 239 And this man that claimed the tobacco was his, he got paid for all of it, didn't he, by the warehouse, and got it back?

A A portion of it, yes.

Q 240 You don't know but what Edward T. Jarrett had pin-hooked that tobacco with him and hadn't paid him for it, do you?

A You mean before he hauled it, or after he got it to the warehouse?

Q 241 Pin-hooked it before he hauled it.

A He didn't tell me that.

[142]

Q 242 Do you know what pin-hooking tobacco is?

A Yes, sir, I certainly do.

Q 243 Have you done some of it?

A No, sir.

Q 244 You've never done it. Now, this truck, the E-Z-Haul truck. You say it was found at Edlin's Machine Shop?

A Yes.

Q 245 And Mr. Cardin told you that somebody brought that in there to him to have some work done on it, and he took it down to Edlin's Machine Shop to have them do it, is that right?

A Yes.

Q 246 Did he tell you that James H. Steel was the one that had brought it in there to have the work done on it?

A No.

Q 247 Well, James H. Steel is the man whose name appears on the rental agreement, isn't it?

A Yes, it appears there.

Q 248 Now, do you know James H. Steel?

A Yes, sir.

Q 249 Have you undertaken to locate him?

A Yes, sir. I arrested him.

Q 250 Do you have him here as a witness?

A No, sir.

Q 251 Do you know whether that's his signature or not?

A No, sir.

Q 252 You don't know, or that isn't his signature?

A I don't know.

Q 253 You don't know whether that's his signature or not?

A No, sir.

[143]

Q 254 Well, he's the man that signed the lease for the truck from E-Z-Haul, according to that?

A According to the papers, that's the name given, yes.

Q 255 Now, you have testified about these truck beds. You did not see any of these truck beds while they were on the chassis that you talked about, did you?

A No, I did not see them on the chassis.

Q 256 So you don't know whether they belonged to those chassis or not, do you?

A Yes, I do.

Q 257 You know this, but you never saw them on the chassis?

A No, I didn't.

Q 258 And you saw them in two different places?

A I saw them in four different locations.

Testimony of Richard McQuown

Q 259 Four different places, and the beds and chassis both are custom chassis and custom beds, aren't they?

A Yes, sir. Well, custom beds.

Q 260 By that I mean the manufacturers made hundreds of them and thousands of them?

A I assume so.

Q 261 Now, did the beds have any serial number that was identical with the chassis?

A Yes, there was one on the E-Z-Haul bed.

Q 262 Where is it?

A Well, I'll have to dig it out (examining folder). Do you want that now?

Q 263 Yes.

WITNESS PRODUCED THE SERIAL NUMBER AND HANDED IT TO DEFENSE COUNSEL.

[144]

Q 264 Now, where did you get that?

A Off a portion of the frame.

Q 265 A portion of the frame?

A I didn't use it to identify it, though. There was a number there that was not significant to me.

Q 266 Now, this bed that was found back of Mr. Cardin's — back of where you say you arrested

Mr. Cardin — did you notice that the fence going into that field had been cut?

A At which farm, sir?

Q 267 Where you say you saw that bed back of his house back there. Did you notice that the fence — the woven wire fence — had been cut?

A No, I didn't go around the fence-line. There's several hundred acres there.

Q 268 But you say that somebody called you and alerted you to come down there?

A No.

Q 269 You didn't say that?

A No, sir. I flew over it by airplane.

Q 270 No, I'm talking about the other place.

A Which place?

Q 271 When you went down there, you say, on the 12th.

A Yes, sir, I was called.

Q 272 Do you mind telling us who called you?

A I'd rather not.

Q 273 Well, will you or won't you?

A I won't.

MR. JAMES: Your Honor, I object.

Q 274 You don't want to tell that, huh? You want to keep that from the jury?

Testimony of Richard McQuown

[145]

MR. JAMES: Your Honor, I object to this.

THE COURT: Let me see the attorneys.

COURT AND COUNSEL CONFERRED OFF THE RECORD OUT OF THE HEARING OF THE JURY.

MR. HATCHER: If you'll excuse me just a minute, Your Honor. The direct examination was so long; I made notes, and I need to check them and see if there's anything else I want to ask him.

THE COURT: Very well.

Q 275 Now, in regard to these cattle. Mr. Cardin told you there was some cattle there that did not belong to him, is that right?

A That is correct.

Q 276 Did you know who they belonged to, or did he tell you who they belonged to?

A Not at the time he didn't, no.

Q 277 He just told you they didn't belong to him?

A Yes. He told me how they got there.

Q 278 Now, was there any serial numbers on any of these cattle?

A No, sir. The owner's here.

Q 279 Did he have them identified and marked or branded or anything?

A He will have to testify to that, sir.

Q 280 You don't know that?

A No, sir.

[146]

Q 281 These cattle were in the field there by the barn that was rented to this fellow Jarrett, were they not?

A No.

Q 282 They were not?

A No. Mr. Cardin told me the barn at the front of the road where the tobacco was was involved in that rental situation, the corn-crib was involved in that situation, and an old residence below his house called the old schoolhouse was rented. He rented these three items right in the middle of the farm.

Q 283 And those cattle were in the barn adjacent to those buildings, weren't they?

A They were on the farm, yes.

Q 284 That's what I mean.

A Yes. That barn is a separate barn from the one we've been referring to of the cattle and where the fire was; it's a different barn than the tobacco was in.

Q 285 Well, the fire wasn't at the barn, was it?

A Behind it.

Q 286 But the same farm?

A Yes, sir.

Q 287 Getting back to this arrest of Mr. Cardin on December the 12th, which you say was on Saturday; did I understand you to say you had him to come in before the Judge on Monday?

A I had him meet me here in the Courthouse Monday.

Q 288 Well, did you meet him here at the Courthouse?

A I believe it was Monday, yes.

Q 289 Did you take out proceedings against him the following Monday?

[147]

A Yes. He was bonded out that day.

Q 290 In what Court?

A Hardin Quarterly Court.

Q 291 Did you execute an affidavit?

A Yes, sir.

Q 292 And have a warrant issued for him?

A Yes, sir.

Q 293 The following Monday?

A I think that's right.

Q 294 Don't you know it's right?

A I believe it was that day, Monday.

Q 295 You believe it was December the 14th?

A (Examining folder) Yes, sir, I met him

here at 9:00, December the 14th, 1970, the same day I went to Greensburg.

Q 296 I don't see it in the Court record here.

A This is my daily report.

Q 297 Well, I'm talking about the Court record; do you have a Court record of it there?

A No, I don't keep the one when I make the arrest; I turn it in to the Court.

MR. HATCHER: I believe that's all I care to ask at this time.

MR. JAMES: Judge, I have some redirect.

AT THIS TIME THE COURT ANNOUNCED A SHORT RECESS, ADMONISHED THE JURY, AND INSTRUCTED THEM TO RETURN IN TEN MINUTES. AT THE END OF THAT RECESS, THE TRIAL OF THE CASE CONTINUED AS SHOWN IN VOLUME II.

* * * * * * *

Testimony of Richard McQuown

[150]

HARDIN CIRCUIT COURT

INDICTMENT NO. 71-46

COMMONWEALTH OF KENTUCKY — PLAINTIFF

vs.

JOHN A. CARDIN — DEFENDANT

TRANSCRIPT OF EVIDENCE

VOLUME II

THE CIURT: Ready to proceed, gentlemen?

MR. HATCHER: Yes, Your Honor.

MR. JAMES: Ready, Your Honor.

THE COURT: Waive the call of the jury?

MR. HATCHER: Yes, sir.

MR. JAMES: Waive the call, Your Honor.

THE WITNESS, RICHARD McQUOWN, RETURNED TO THE WITNESS STAND AND WAS FURTHER EXAMINED AS FOLLOWS:

REDIRECT EXAMINATION BY MR. JAMES:

Q 298 Detective McQuown, Mr. Hatcher has asked you about the conversation between you and Mr. Cardin, John A. Cardin, on December the 12th,

1970, and in that questioning he asked you if you had told the entire conversation you had, and you said you had not. Is that true?

A That's true.

Q 299 Now, without saying what you had left out or what it had to do with, will you tell me why you did leave anything out?

[151]

A A considerable amount of this hour and a half conversation was not related to the four charges involved in the cases in this Court at this time, and the Court instructed me not to discuss them.

Q 300 And is that the part that you have omitted from it?

A Yes, it is.

Q 301 Now, what you have told is as near as you can tell it what took place with regards to that conversation?

A Yes, sir.

Q 302 Now, Mr. McQuown, you also were asked about James H. Steel, and I believe you said you knew him?

A Yes, I know James Steel.

Q 303 Did you, in the course of the investigation and for the period from December the 10th, that being Thursday, through Thursday, Friday, and Sat-

urday, and the next time the 14th on Monday — see John H. Steel around the premises of John A. Cardin or, particularly, the E-Z-Haul truck?

A No, I've never seen James Steel in Hardin County.

Q 304 At any time?

A Not at any time ever.

Q 305 Now, during that same period of time, did you ever see a man purporting to be Edward T. Jarrett on the premises of John A. Cardin?

A No, never. Edward T. Jarrett I did check on, of Route 3, Cave City, Kentucky. I checked all the records that could possibly be checked in Barren County, Kentucky — at Glasgow, which is the County Seat of Barren County; I checked the courthouse records in Hart County which [152] could give a Cave City address at the edge of Hart County; I checked the Kentucky drivers license files and there's no drivers license issued to this subject; there is no tax records; there is no property records; there are no records on any Edward T. Jarrett in any of the counties, and he's also not in the Louisville phone books or the Louisville cross-index directories; nor is he in the Hardin County Court records.

Q 306 Had you received from anybody a description of a man purporting to be Edward T. Jarrett?

A Yes, I had. John Cardin told me his description.

Testimony of Richard McQuown

Q 307 Did you look for such a man?
A Yes, I did.

Q 308 Did you find him?
A No, I did not.

Q 309 Detective McQuown, in your testimony in cross examination, you stated that you had secured a warrant against John A. Cardin on December the 14th, 1970?

A Yes, I testified to that.

Q 310 Now, did or not you make a mistake?
A Yes, I made a mistake. On December the 14th a warrant was not issued for John A. Cardin at that time. I came to the courthouse here and warrants were issued for other persons, but not John A. Cardin. The bench warrant was returned and that was served on John Cardin, but not that day.

Q 311 That was later?
A That was later, yes, it was.

Q 312 But on this date you did not?

[153]

A No, I went down here on the day to issue warrants, and in the cross examination I didn't complete the sentence, and it gives the name of who but I didn't go all the way out and read it.

Q 313 You were in error, then?
A Yes, I was in error.

MR. JAMES: That's all.

RECROSS EXAMINATION BY MR. HATCHER:

Q 314 Now, in regard to excuting an affidavit and issuing a warrant, in my examination of you a while ago when you were under oath, you absolutely swore to this jury that you had executed an affidavit and there was a warrant issued to this man on December the 14th, 1970, didn't you?

A I think that's correct.

Q 315 And now you are swearing that you were wrong when you swore that, aren't you?

A When I checked my records, that is correct.

Q 316 Which is an indication that you can be wrong on anything you've sworn to, can't you?

A Well, I was wrong on that point, and that's all.

Q 317 You was wrong on that, and you could be wrong on anything else, couldn't you?

A I can make mistakes; yes, I can.

MR. HATCHER: That's all.

REREDIRECT EXAMINATION BY MR. JAMES:

Q 318 Detective McQuown, did you receive any information from anybody concerning the whereabouts or what happened to the body of the truck that belonged to Alton Miller?

[154]

MR. HATCHER: Now, Your Honor, I object to what information he received from someone.

THE COURT: If he received information, all right; but not what the information was.

Q 319 Did you receive information, first?

A Yes.

Q 320 Who did you get that from?

A John Cardin.

Q 321 And when did you get it?

A During that period of investigation, with two or three days involved in it.

Q 322 And is that a part of what you testified about?

A Yes.

Q 323 That case?

A Yes.

Q 324 Now, did or not he tell you anything about the body of that truck?

A Yes, he did. He told me he took it to one of his farms and had a bulldozer bury it.

Q 325 Did he tell you where it was buried?

A Yes, he did.

Q 326 Did or not you go to that place?

A Yes, he told me I could go out there and look around all I wanted to.

Testimony of Richard McQuown

Q 327 And did you make any pictures there?

A I certainly did.

Q 328 Do you have those pictures?

A Yes, I do.

PHOTOGRAPHS WERE EXHIBITED TO COURT AND DEFENSE COUNSEL.

[155]

Q 329 You have handed me five photographs, Detective McQuown. Will you file these and make them a part of your testimony, marking them for identification Commonwealth Exhibits No. 29, 30, 31, 32, and 33?

A Yes, sir.

(Five photographs referred to above are filed herewith and made a part hereof, marked for identification, Commonwealth Exhibits No. 29, 30, 31, 32, and 33.)

Q 330 Now, I will show you Exhibits 29 through 33, and ask you if you made the photographs yourself?

A Yes, I did.

Q 331 And what do they purport to show?

A Well, they're black and white. The color of these pieces of metal that appear to be brown are green, the same color of the Alton Miller truck. The bed, the lower section of the bed, and the 1965 Chevrolet truck recovered on the farm.

Testimony of Richard McQuown

Q 332 Now, are those metal pieces, or what?
A Yes, that's sheet metal, and some stronger portions of the metal — brackets, braces — and they were buried; part of them were sticking up after the ground settled when the rain settled the ground around it.

Q 333 And were these pictures made at the place Mr. Cardin told you the bed was buried?
A Yes, they were.

MR. JAMES: Your Honor, we'd like to exhibit these to the jury.

THE COURT: Very well.

COMMONWEALTH EXHIBITS NO. 29, 30, 31, 32, AND 33 WERE EXHIBITED TO THE JURY.

[156]

Q 334 Detective McQuown, Mr. Hatcher asked you if Mr. Cardin didn't tell you that he took the tobacco to Greensburg for Edward T. Jarrett, did he not?
A No, he took it there for himself.

Q 335 Well, I say Mr. Hatcher asked you that?
A Oh, yes, Mr. Hatcher asked me that, yes.

Q 336 Now, did Mr. Cardin tell you that?
A No.

Q 337 What did he tell you about the tobacco?
A That he took it there himself; he never mentioned Edward T. Jarrett.

Testimony of Richard McQuown

Q 338 Did you go to Greensburg?
A Yes, I did.

Q 339 And did you go to market?
A Yes, I did.

Q 340 Did you get bills for that?
A Yes, I did.

Q 341 Do you have those bills?
A Yes, sir. It shows the weights of the different amounts of the baskets.

WITNESS PRODUCED PAPERS WHICH WERE EXAMINED BY THE COMMONWEALTH ATTORNEY, THE COURT, DEFENSE COUNSEL AND DEFENDANT.

Q 342 First, I show you two papers purporting to be from the Burley Tobacco Warehouse No. 2, Greensburg, Kentucky, and ask you if those are the statements or bills —

MR. HATCHER (Interrupting): Your Honor, I object to the introduction of anything that's not identified as tobacco that's related to this indictment. Mr. Cardin raised some tobacco, and —

[157]

MR. JAMES: Mr. Hatcher, if you'll just wait a minute, I'll —

MR. HATCHER: It must be identified definitely as his.

MR. JAMES: Yes.

Testimony of Richard McQuown

Q 343 Will you file those as part of your testimony, marking them for identification Commonwealth Exhibits No. 34 and 35?

A Yes.

(The bills referred to above are filed herewith and made a part hereof, marked for identification, Commonwealth Exhibits No. 34 and 35.)

Q 344 Detective McQuown, at Greensburg, at the tobacco warehouse, Burley Tobacco Warehouse No. 2, did Mr. Cardin make any statement concerning a portion of the Parsley tobacco, and whether or not it was included in this tobacco?

A Yes, it was. John Cardin gave me those papers himself; they were his copies.

Q 345 Now, was there anything done in Greensburg in Mr. Cardin's presence pertaining to the Parsley tobacco?

A He didn't name the buyer by each individual name, but before we left he stated the remaining portion of that pile of tobacco was taken to Greensburg, Kentucky, and he took me to that.

Q 346 Well, when the tobacco was sold was anything said about who was to get the proceeds for the sale of the tobacco, the Parsley tobacco?

A Yes, sir.

Q 347 Who was to get that?

A Mr. Parsley.

[158]

Q 348 And who was it that said that?

A John Cardin.

MR. JAMES: Your Honor, we'd like to exhibit these two bills to the jury.

THE COURT: I think they're competent. You may.

COMMONWEALTH EXHIBITS NO. 34 AND 35 WERE EXHIBITED TO THE JURY.

MR. JAMES: That's all.

RERECROSS EXAMINATION BY MR. HATCHER:

Q 349 Now you're saying that Mr. Cardin gave you some more confessions at the warehouse in Greensburg, is that right?

A Not in a sense of a confession, no; a statement.

Q 350 When he said it then, did you have it written down?

A No, I did not.

Q 351 Did you have anything signed by him?

A No, I did not.

Q 352 Did you have any recording of it?

A No, I did not.

Q 353 Yet you were contemplating using that as evidence against him, is that right?

Testimony of Richard McQuown

A That's right. He told me he took that tobacco there, and he took me to it.

DEFENSE COUNSEL EXAMINED COMMONWEALTH EXHIBITS NO. 34 AND 35.

Q 354 Mr. McQuown, at the time you say you obtained these weigh slips from Mr. Cardin, was there anyone else present?

* * * * * * *

[160]

DIRECT EXAMINATION BY MR. JAMES:

Q 1 Is your name A. O. Bingenheimer?
A Yes, sir.

Q 2 Where do you live, Mr. Bingenheimer?
A Minneapolis, Minnesota.

MR. HATCHER: I wonder if we could get you to spell your name?

WITNESS: B-i-n-g-e-n-h-e-i-m-e-r.

Q 3 By whom are you employed?
A National Car Rental.

Q 4 Now, what, if any, is the connection between that and E-Z-Haul?
A E-Z-Haul is a wholly owned division.

Q 5 So E-Z-Haul is owned by National Car Rental?

A Yes, sir.

Q 6 Mr. Bingenheimer, were you ever, in the course of your employment, located in Louisville, Kentucky?

A Yes, sir.

Q 7 What period of time were you there?

A Up until January of '71.

Q 8 You were there, then, during November and December of 1970?

A Yes, sir.

Q 9 Now, during the month of December, 1970, was a 1970 Chevrolet truck, green in color, I believe, rented by E-Z-Haul to a James H. Steel?

A Yes, sir.

Q 10 Is that the rental contract for that truck?

A Yes.

Q 11 Now, under this contract, for what period of time was the truck rented?

[161]

A I believe it's December 5th through the 7th — let me see here. Yes, through December the 7th.

Q 12 Now, on December the 7th, was the truck supposed to be returned under that rental agreement?

A I'm looking for the return date, sir. I don't see it right off.

Testimony of A. O. Bingenheimer

THE COURT: Mr. James, I'm afraid no one is hearing Mr. Bingenheimer.

MR. JAMES: I might stand back a little, that might help.

A (Continuing) I don't see the return date on here, sir.

Q 13 Was the truck returned during the rental period?

A No, sir.

Q 14 Was or not it reported as stolen or converted?

MR. HATCHER: We object to what was reported.

THE COURT: Sustained. Just what happened.

Q 15 Well, tell the jury just what happened, Mr. Bingenheimer.

A Well, we received a call from the State Police Post in E'town requesting a serial number —

MR. HATCHER: We object.

THE COURT: Well, he may state whether the truck was returned or what he knows about it. Now, calls that he got from someone else, I doubt if they're competent.

MR. JAMES: I'll ask him this, Judge, to make it clear.

Testimony of A. O. Bingenheimer

Q 16 Did or not you come to Elizabethtown in connection with that truck?

A Yes, sir.

Q 17 Where did you go, Mr. Bingenheimer?

A I went down the street to a garage down here.

Q 18 And did or not you see the truck?

A Yes, sir.

[162]

Q 19 Now, you say you went down the street down here. Do you know the name of the place you went?

A Edlin's, I believe, is the name of it.

Q 20 Edlin's Machine Shop?

A Yes, sir. Edlin's.

Q 21 Now, there, did you or not see your truck or any part of it?

A The cab and chassis were in the shop, sir.

Q 22 Now, did or not it have a serial number?

A Yes, sir.

Q 23 What was the serial number of the cab and chassis?

A Let me see. The serial number was CE-530-P-157436.

Q 24 And was that number on the chassis?

A Yes, sir.

Q 25 Did you see the body of the truck anywhere?

A Not at that garage, sir.

Q 26 Where did you see the body of the vehicle?

A It was on a hillside out here in the country somewhere.

Q 27 How did you get to where it was, Mr. Bingenheimer?

A I went with Mr. McQuown and some other officer.

Q 28 Was it Detective McQuown and maybe Detective Chambers?

A Yes, sir.

Q 29 Do you know yourself where you went and saw it?

A By name, I don't know.

Q 30 Was the body that you saw the body of your truck?

A Yes, sir.

Q 31 At the place you did go?

A Yes, sir.

Q 32 Mr. Bingenheimer, I show you Commonwealth Exhibit No. 19 and ask you if you recognize that?

Testimony of A. O. Bingenheimer

[163]

A Yes, sir, I do. It's a rental contract folder.

Q 33 Will you speak out louder?

A It's a rental contract folder which we use in our truck rental business.

Q 34 Now, I'll show you two license tags, they being each, Oregon at the top, and T297629, and ask you if you know anything about those license tags?

A They belonged to this particular truck.

Q 35 To the '70 Chevrolet we've been talking about?

A Yes, sir.

Q 36 Now, on each tag is written some letters and some numbers. Do you see that on each one of these?

A Yes, sir.

Q 37 Does that have any significance, and if so, what?

A It's an identifying number for our own purposes; it's a unit number that we assigned to that particular vehicle.

Q 38 And is this number BO4836?

A Yes, sir.

Q 39 Assigning it to what vehicle?

A Well, to that particular Chevrolet that we were —

Q 40 (Interrupting) The 1970 Chevrolet?
A Yes, sir.

Q 41 Now, had that vehicle had any license in the month of December, 1970, other than this Oregon license?

A Yes, sir, it should have had a pro-rate — or it did have a pro-rate plate assigned to it.

Q 42 What is that?

A Well, it's an additional plate that you don't have here and I don't recall that I ever saw it on the truck or the body.

[164]

Q 43 Now, have you given anybody — James H. Steel, or anybody else — permission to keep this truck beyond December the 7th?

A No, sir.

Q 44 Or to remove the body from it or to make any changes of any kind to it?

A No.

Q 45 Mr. Bingenheimer, I'll show you Commonwealth Exhibit No. 16 which has been identified as being a picture of license plates in the cab of the vehicle. Would you examine that picture and state whether or not you know what those tags are that are shown in that picture?

A Yes, sir, the Oregon plate which we have here, and the pro-rate plate which I just mentioned, the Wisconsin pro-rate plate.

Testimony of A. O. Bingenheimer

Q 46 Now, the pro-rate plate which you say is a Wisconsin plate, was also on the vehicle as well as the —

A (Interrupting) Normally, yes, sir, on the front of the vehicle.

Q 47 And that was the pro-rate plate, the Wisconsin plate?

A Yes, sir.

Q 48 Mr. Bingenheimer, did you make an examination of the chassis of the truck, of whether or not any changes had been made in it?

MR. HATCHER: Your Honor, I object. I think he can only testify to what he saw.

THE COURT: Just what he saw. That is correct.

Q 49 Well, did you make an examination?

A Yes, sir.

[165]

Q 50 Did you see anything about it that you noticed?

A Yes, sir. The chassis had been altered — lengthened.

MR. HATCHER: We object, and move that the witness be admonished for defiance of the Court's order. He said the length —

THE COURT: He said what he saw was that

the chassis had been altered. What did you notice about the chassis (addressing the witness)?

WITNESS: It was lengthened, sir. An additional length of steel was put in the frame which resulted in a longer chassis in the truck.

Q 51 And you saw that yourself?

A Yes, sir.

Q 52 And did you see and observe the body?

A Yes, sir.

Q 53 What, if anything, did you notice about the body, and what did you see?

A The E-Z-Haul identification had been removed from it, or attempted. It was obliterated.

MR. HATCHER: I guess there's not any use in objecting, Your Honor, as long as he's said it.

THE COURT: I think he's stating what he saw. I mean that —

MR. HATCHER: Okay.

THE COURT: What he observed; not what he assumes somebody else might have done. But the witness may testify to what he saw himself.

MR. JAMES: You may cross examine.

Testimony of A. O. Bingenheimer

CROSS EXAMINATION BY MR. HATCHER:

Q 54 Mr. Bingenheimer, are you still with the National Car Rental or are you in some other business now?

* * * * *

[167]

Q 62 Was either one of them sold to anyone?

A The truck eventually was sold.

Q 63 How about the bed?

A I really don't know. I had left town and it was handled by an attorney here in E'town, the sale of the vehicle.

Q 64 What attorney?

A Collier, I believe — Mr. Arnett.

Q 65 Are they the attorneys for your collision insurance carrier?

A Not to my knowledge.

Q 66 You did have collision insurance on them, didn't you?

A No, sir.

Q 67 Doesn't that contract say you did?

A No, sir, it doesn't.

MR. HATCHER EXAMINED RENTAL CONTRACT.

Q 68 Well, it says collision damage waiver,

$250.00 deductible applies excepted. Well, you've got it in fine print over here and I can't read it.

A That's true.

MR. HATCHER: I believe that's all.

REDIRECT EXAMINATION BY MR. JAMES:

Q 69 Mr. Bingenheimer, what position did you hold with the local office of your company?

A I was the Operations Manager.

Q 70 As such, were you in charge of the rental vehicles?

A Yes, sir.

Q 71 Were you or not, or are you familiar with the fair and reasonable market value of this vehicle in December of 1970 in this area?

[168]

A Approximately, yes, sir.

Q 72 What would that be?

A Probably in the neighborhood of $5,000.00 at that time.

MR. JAMES: That's all.

RECROSS EXAMINATION BY MR. HATCHER:

Q 73 When had you last seen this particular vehicle?

A When had I last seen it? Before when, or what time, sir?

Testimony of A. O. Bingenheimer

Q 74 Before it was leased out to Steel.

A I couldn't say that I myself had seen it prior to that time.

MR. HATCHER: Your Honor, I move that his testimony concerning the value be stricken.

THE COURT: Do you want to interrogate him further, Mr. James?

MR. JAMES: I do, Your Honor.

REREDIRECT EXAMINATION BY MR. JAMES:

Q 75 Mr. Bingenheimer, you say that you don't recall, or you don't know whether you had seen it before that time? Did I understand you?

A That is correct, sir.

Q 76 Were you, in general, familiar with the vehicles, whether this particular one or not, in your custody and under your control?

A Yes, sir.

Q 77 Now, were or not those vehicles under your control in the operation of this office?

A Yes, sir, they were.

Q 78 And kept and maintained under your supervision?

A That is correct.

[169]

Q 79 Now, would or not you keep and main-

tain a vehicle that had a value of less than a hundred dollars?

MR. HATCHER: We object. If he don't recall ever seeing this vehicle, I don't see how he can give any opinion on the value of it, Your Honor.

THE COURT: Well, he saw it here.

MR. HATCHER: He never saw it before, though.

Q 80 Would you keep a vehicle that was worth under $100.00?

A Not normally, no, sir.

Q 81 And in this type of business, do you or not have to keep your vehicles in good condition?

A Yes.

MR. JAMES: That's all.

MR. HATCHER: I don't have anything further.

THE COURT: What was the value of the vehicle you saw here?

WITNESS: That would have to be an estimate or a guess. Perhaps $1500.00, or something like that.

MR. JAMES: I don't think the jury could hear him, Your Honor.

THE COURT: He said around $1500.00 when he saw it.

Testimony of A. O. Bingenheimer

MR. JAMES: Mr. Hatcher, will you want Mr. Bingenheimer any more?

MR. HATCHER: No, as far as I'm concerned, he can be finally excused.

ALBERT PARSLEY, CALLED AS WITNESS ON BEHALF OF THE COMMONWEALTH OF KENTUCKY, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY MR. JAMES:

Q 1 Is your name Albert Parsley?
A Yes, sir.

[170]

Q 2 Where do you live, Mr. Parsley?
A Park City.

Q 3 What is your business or occupation?
A Farmer.

Q 4 Were you a farmer in the crop year of 1970?
A Yes, sir.

Q 5 During that year, did or not you raise a tobacco crop?
A Yes, sir.

Q 6 After the crop had been cut and housed, did anything happen to it?

A Yes, sir.

Q 7 What, Mr. Parsley?

A Somebody stole it on Thanksgiving Eve night.

MR. HATCHER: Your Honor, I object unless he was there and saw it.

THE COURT: Well, he will know whether it was there in the night and whether it was gone the next morning, I suppose.

MR. HATCHER: I'm objecting to him drawing conclusions about what happened to it.

THE COURT: Well — go ahead, Mr. James.

Q 8 Did it disappear, Mr. Parsley?

A Yes, sir.

Q 9 Did you give anybody permission or consent to remove it or take it?

A No, sir.

Q 10 And was it there Thanksgiving Day?

A No, sir,

Q 11 When was it that it disappeared?

A The night before Thanksgiving.

Q 12 Was it there the day before Thanksgiving?

[171]

A I was there at five o'clock and sprayed it and wrapped it up in plastic.

Q 13 And then on Thanksgiving Day —

A I went at seven o'clock to load it, and it wasn't there.

Q 14 It wasn't there. Now, Mr. Parsley, did or not you ever see any part of that crop later?

A What did you say?

Q 15 Did you see any part of your crop later?

A Yes, sir.

Q 16 How much was your crop before it disappeared — what was the poundage of it, if you know?

A Ten thousand pounds.

Q 17 Now, when you next saw your tobacco, was it all there?

A No, sir.

Q 18 How much was missing?

A About six thousand pounds.

Q 19 Approximately half gone?

A Yes, a little over half gone.

Q 20 Was the part that you saw at the place you went to — did you go to that place to see it where it was?

A I saw a couple of hands, and I identified that it was mine.

Q 21 Ofter seeing the two hands, did you see the rest of it?

A Yes, sir.

Testimony of Albert Parsley

Q 22 And was it your tobacco?

A Yes, sir.

Q 23 Mr. Parsley, will you explain to the jury just how you were able to identify it — what distinction there was about that from any other crop?

[172]

A I had a lady that stripped all the tips; I guess there wasn't over a hand stripped in the crop — I mean a stick stripped in the crop but what she stripped them. And in place of tying the tips around this-a-way (indicating), she tied them around this-a-way (indicating).

Q 24 Is that unusual?

A That's really unusual.

Q 25 How long have you been growing or raising tobacco?

A Oh, ever since I was big enough.

Q 26 Has that been a number of years?

A Yes, sir, I'm forty-five.

Q 27 Would you say you've had much or little experience with tobacco?

A I was floor boss at the Glasgow Tobacco Barn for five years; I worked there eight.

Q 28 And are you able to say definitely that this was your tobacco crop?

A Yes, sir.

Testimony of Albert Parsley

Q 29 Now, Mr. Parsley, where was the tobacco that you recovered?

A Down here at Mr. Cardin's barn.

Q 30 Was that John A. Cardin?

A Yes, sir.

Q 31 In Hardin County?

A Yes, sir.

Q 32 The part that was not recovered there, do you know where it was?

A Some of it was at Greensburg at the tobacco barn.

Q 33 And did or not you get any part of that, or anything for it?

[173]

A Yes, sir.

Q 34 What was it you got, Mr. Parsley?

A I believe there was five or six of us, and they divided it between us proportionately.

Q 35 Well, did you get paid for part of your tobacco?

A The part that was at Greensburg?

Q 36 Yes.

A Yes, sir.

MR. JAMES: You may ask him.

CROSS EXAMINATION BY MR. HATCHER:

Q 37 Now, Mr. Parsley, your tobacco crop — you say it had been stripped?

A Yes, sir.

Q 38 Did you put any paint or identifying marks or anything on that tobacco to tell it from any other tobacco?

A No, sir.

Q 39 The only way you say you could tell that from other tobacco is because you had a woman hired to help you and she did it this-a-way instead of that-a-way, is that right?

A Well, me and my sister-in-law stripped the lugs, and she tied longer down on the end that I did.

Q 40 Your sister-in-law stripped lugs —

A (Interrupting) And me.

Q 41 And you. So some of the hands in the lugs was tied farther down than others?

A She stripped about every other one, and me stripped every other one.

* * * * *

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Q 77 Well, Cave City's five miles away, is that about right?

A Yes.

Q78 Do you remember how much you got for

that tobacco that was sold at the Greensburg warehouse?

A No, sir, I don't.

Q 79 Well, would it be about $1300.00?

A I wouldn't say; I just don't remember off-hand.

Q 80 (Showing witness a paper) Is that your signature?

A Yes, sir.

Q 81 Is that your name?

A Yes, sir.

Q 82 Does it say $1323.15?

A Yes.

Q 83 From Burley Tobacco Warehouse No. 2, Greensburg, Kentucky?

A Yes, sir.

Q 84 Do you think that's about right?

A I guess it is.

MR. JAMES: May we see that paper?

THE PAPER REFERRED TO ABOVE WAS HANDED TO THE COMMONWEALTH ATTORNEY.

MR. HATCHER: I believe that's all.

REDIRECT EXAMINATION BY MR. JAMES:

Q 85 Mr. Parsley, when the tobacco was in your possession, was it or not on the sticks?

Testimony of Albert Parsley

A Yes, sir.

Q 86 Now, when you saw it at Mr. Cardin's place was it on the sticks?

A Yes, sir.

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Q 87 Was there anything about the sticks that you could tell them?

A Yeah, I sharpen my sticks and drive them, used to, and spike tobacco. They was split sticks, most of them, and they was sharp where I drove them in the ground.

Q 88 Now, was there any other identification about the sticks, or markings of any kind?

A No.

Q 89 Now, was the tobacco you saw at Mr. Cardin's on that same kind of sticks?

A Yes, sir.

Q 90 What was the total reasonable value of your tobacco crop, on the day before Thanksgiving, I mean?

A Oh, about eight thousand dollars, I'd say.

Q 91 And you didn't give anybody permission to take the tobacco, did you?

A No, sir.

MR. JAMES: That's all.

MR. HATCHER: Your Honor, the copy of the check referred to, I guess should be filed in the record,

since there's been reference to it. (To Reporter) Mark it Parsley Exhibit 1.

(The check referred to above is filed herewith and made a part hereof, marked for identification, Parsley Exhibit No. 1.)

When you duplicate something, you have to make two sheets of it, the front and the back. The jury may like to see this.

PARSLEY EXHIBIT NO. 1 WAS EXHIBITED TO THE JURY.

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RECROSS EXAMINATION BY MR. HATCHER:

Q 92 Mr. Parsley, that tobacco at the warehouse; was that on sticks?

A It was on baskets.

Q 93 So your sharp sticks wouldn't help you identify it at the warehouse?

A No, sir.

Q 94 Now, you say you have a peculiar way of fixing your sticks so that they're sharp on one end so you can drive them in the ground?

A I sharpen my sticks; I wouldn't call it no peculiar way.

Q 95 Well, are they sharp unlike our Hardin County sticks?

Testimony of Albert Parsley

A I never raised no tobacco in Hardin County.

Q 96 You don't know how we sharpen them up here?

A No, sir.

MR. HATCHER: That's all I care to ask him.

JAMES PARKER, CALLED AS WITNESS ON BEHALF OF THE COMMONWEALTH OF KENTUCKY, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY MR. JAMES:

Q 1 Is your name James Parker?

A Yes, sir.

Q 2 Where do you live, Mr. Parker?

A Park City, Kentucky.

Q 3 What is your business or occupation?

A I own a filling station and a farm.

Q 4 And in November and December of 1970, did you then own a farm?

[180]

A Yes, sir.

Q 5 And did or not you own any Holstein cattle?

A Yes, sir.

Testimony of James Parker

Q 6 And did or not you lose any Holstein cattle, or were any taken from your farm?

A Yes, sir.

Q 7 Were they taken with your consent or your permission?

A No, sir.

Q 8 Do you know when they were taken, Mr. Parker?

A Well, sometime between six o'clock and it was around seven or eight o'clock the next morning when I went back up there. I didn't live right at the farm at this time.

Q 9 And what month was it?

A Sir?

Q 10 What month was it?

A Well, I don't know whether it was November or December — it was right at the last part of November, I believe.

Q 11 And you were there one afternoon, and then when you went there the next morning they were gone?

A Yes, sir.

Q 12 Mr. Parker, how many head of cattle did you lose?

A Thirty-four head.

Q 13 At that time in that area, were you fa-

miliar with the fair and reasonable market value of Holstein cattle of that kind?

A Yes, sir.

Q 14 In the sizes that you had?

A Yes, sir.

Q 15 What would be the fair and reasonable market value of those cattle?

[181]

A Around $200.00 a head.

Q 16 And you lost thirty-four head?

A Yes, sir.

Q 17 And they had — you fixed the value at $6800.00?

A Right.

Q 18 Now, Mr. Parker, did you recover or see those cattle again at any time?

A No, sir, not till I was notified that there was some of them at Sonora, and we found part of them in Edmondson County.

Q 19 Now, the ones in Sonora — did you see those?

A Yes, sir.

Q 20 Where were they?

A They was on the farm of John A. Cardin.

Q 21 Is that he sitting over there with Mr. Hatcher?

A Yes, sir.

Q 22 Now, how many head were there?

A Twenty-four head.

Q 23 And were they your cattle?

A Yes, sir.

Q 24 Were you able to identify them as being your cattle?

A Yes, sir.

Q 25 How did you do that?

A Well, there was some calves in there that I had raised and, I mean, there's just features about them that you don't forget because I'd seen them twice a day for — I'd had them seven or eight months.

Q 26 And you were positive that those were your cattle?

A Yes, sir.

[182]

Q 27 And that was 24 head of them?

A Yes, sir.

Q 28 Were the other ten ever found?

A Yes, sir, we found those in Edmondson County.

Q 29 Now, were any of them hurt or was there a difference in them?

A Well, they had lost quite a bit of weight.

MR. JAMES: You may ask Mr. Parker.

CROSS EXAMINATION BY MR. HATCHER:

Q 30 Mr. Parker, you say you live at Park City?

A Yes, sir.

Q 31 And that is Cave City, Route 3?

A No, sir, it's Park City, Route 2.

Q 32 Where is Cave City, Route 3?

A I really don't know.

Q 33 Cave City is right close to Park City, isn't it?

A Yes, sir; six miles.

Q 34 Do you know an Edward T. Jarrett from Cave City?

A Who?

Q 35 Edward T. Jarrett.

A No, I don't; I never heard of him.

Q 36 So you don't know anything about these cattle from the time you say that they were missing until you located some up here in Hardin County and some in Edmondson County?

A That's right.

Q 37 You don't know who got them or when they got them, other than you say in one morning?

[183]

A Yes, sir.

MR. HATCHER: That's all.

Testimony of James Parker

REDIRECT EXAMINATION BY MR. JAMES:

Q 38 Mr. Parker, have you lived in the area where you now live long?

A I was born and raised there.

Q 39 And are you pretty well acquainted in that community with the other people around there?

A Yes, sir.

Q 40 And you say you've never heard of an Edward T. Jarrett?

A No, sir.

MR. JAMES: That's all.

MR. JAMES: Your Honor, I want to call Mr. Hatcher. I want to ask him one question. He's been talking about pin-hooking and I want to ask him about that.

MR. HATCHER: Do you want to swear me?

THE COURT: Oh, well, you can just tell him what pin-hooking is.

MR. HATCHER: Well, pin-hooking is where a fellow raises tobacco and somebody on his farm, and instead of taking it to the warehouse and selling it, there are people who buy it direct from the farmer and they, in turn, take it to the warehouse and sell it —and they're called pin-hookers. And with the present-day method of rationing or marketing cards, the pin-hooker buys it from the farmer and the farmer gives him his card and he takes it on to the ware-

house, and he has to have that card to sell it. But he is called a pin-hooker, and he might make money or he might lose money. Is that it?

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MR. JAMES: One other question. Once you pin-hook, the farmer who let the other fellow have his tobacco, has no interest or no control over the proceeds when the tobacco's sold?

MR. HATCHER: No, the pin-hooker gets the marketing card.

MR. JAMES: And only he can dispose of it?

MR. HATCHER: Right. Oh, he can sell it to another pin-hooker.

MR. JAMES: Thank you.

JOSEPH EUGENE MILLER, CALLED AS WITNESS ON BEHALF OF THE COMMONWEALTH OF KENTUCKY, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY MR. JAMES:

Q 1 Is your name Joseph Eugene Miller?
A Yes, sir.

Q 2 Where do you live, Mr. Miller?
A Bowling Green, Kentucky.

Q 3 Are you the son of Alton Miller?

Testimony of Joseph Eugene Miller

A Yes, sir.

Q 4 Has your father recently been injured in an automobile accident?

A Yes, he has.

Q 5 Is he able to be here in Court?

A No, sir.

Q 6 Is he in the hospital now?

A He's in intensive care.

Q 7 Mr. Miller, have you been associated with your father in the trucking rental business in Bowling Green, Kentucky?

A Yes, sir.

[185]

Q 8 Are you or not familiar with a 1965 Chevrolet with a moving van, or furniture van, type of body on it that was rented from your company in November or December of 1970?

A Yes, sir.

Q 9 I believe that rental was to a James H. Steel, was it not?

A Yes, sir.

Q 10 Did you have any part in this rental?

A No, sir, I didn't.

Q 11 Now, was the truck returned to the company in accordance with the rental provisions?

A No, sir, it wasn't.

Testimony of Joseph Eugene Miller

Q 12 And when rented, were there any contents in the body of the vehicle?

A They rented a dolly and twelve pads with it.

Q 13 Have you seen the truck since it was rented?

A We got the chassis and the cab back.

Q 14 The chassis and the cab?

A Yes, sir.

Q 15 And was or not the body gone?

A The body was gone, yes, sir.

Q 16 Have you seen any part of that body?

A No, I have not.

Q 17 Now, at the time it was rented, what was the fair and reasonable market value of the truck and the moving van body?

A Just off-hand, I would say close to $2400.00 — maybe more than that with that kind of body on it.

Q 18 Will you speak up louder so the jury can hear you?

A I say I don't really know the exact — what it would be worth — but with that type of van body on it, it would be [186] close to or more than $2400.00, somewhere along there.

Q 19 It would be well over a hundred dollars, wouldn't it?

A Oh, yes, sir.

Q 20 Now, Mr. Miller, when you got the chassis and the cab, was that your truck? You identified it as being your truck?

A Yes, sir.

Q 21 Had it been kept and retained beyond the rental period without your permission?

A Yes, sir.

Q 22 And had anybody your permission or authority to remove the body from it or do anything at all to it?

A No, sir.

Q 23 Now, do you know what the serial number of the truck was?

A I don't have that information with me.

Q 24 I will show you a copy of the invoice for the vehicle.

(THE COMMONWEALTH ATTORNEY SHOWED A PAPER TO THE DEFENSE COUNSEL. THEN HANDED IT TO THE WITNESS.)

Now, from that copy can you tell us what the serial number was?

A The serial number is not listed on this; you'd have to have the license.

Q 25 That is an invoice at the time you bought it?

A This is the rental agreement.

Testimony of Joseph Eugene Miller

Q 26 Was there any way you could identify, other than the serial number, the chassis and cab of that truck?

A The cab was the same color; you can look at the cab and tell it was the same truck.

Q 27 Well, are you or not positive that that was your truck?

A Yes, sir, it was our truck.

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Q 28 Do you have any papers with you at all pertaining to this?

A I have just the copies you have, and this is more clear.

Q 29 This was the vehicle that was purported to be rented to James Steel?

A Yes, sir.

Q 30 Was or not the chassis and cab returned to you as owners of it?

A Yes, sir.

Q 31 And have you kept and used the vehicle?

A Yes, sir.

Q 32 Is it in use now?

A Yes, sir, it is.

Q 33 And that is the same vehicle that you got here in Elizabethtown after it had been rented as we've talked about?

A Yes, sir.

Testimony of Joseph Eugene Miller

MR. JAMES: That's all.

CROSS EXAMINATION BY MR. HATCHER:

Q 34 This truck — you say it was a 1965 Chevrolet?

A Yes, sir.

Q 35 And who owned that truck?

A It's the property of the Yellow Cab U-Drive-It Company.

Q 36 Well, do you own the Yellow Cab U-Drive-It Company?

A My father does.

Q 37 Your father does?

A Sir?

Q 38 I say your father owns it? Is it a corporation?

A Yes, it's a corporation.

Q 39 Are you an agent or an officer of that corporation?

A I'm an officer.

* * * * *

Testimony of James Chambers

[189]

JAMES CHAMBERS, CALLED AS WITNESS ON BEHALF OF THE COMMONWEALTH OF KENTUCKY, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY MR. JAMES:

Q 1 Is your name James Chambers?
A Yes, sir.

Q 2 Where do you live, Mr. Chambers?
A Radcliff, Kentucky.

Q 3 Do you or not have any official position with the Kentucky State Police?
A Yes, sir, I'm employed as a detective with the State Police.

Q 4 Were you so employed in November and December of 1970?
A Yes, sir, I was.

Q 5 Were you then stationed at the Elizabethtown Post?
A Yes, sir.

Q 6 Did you take any part and assist in the investigation of the matters in connection with Detective McQuown involving some trucks and tobacco and cattle down in the Sonora area?
A I was present during a portion of it, yes, sir.

Testimony of James Chambers

Q 7 On what date were you present?
A On the 12th of December.

Q 8 The 12th of December, 1970?
A That's right.

Q 9 Where were you on that occasion, Detective Chambers?
A On the farm of John A. Cardin.

Q 10 Had you gone there with Detective McQuown?
A Yes, sir.

[190]

Q 11 Now, Detective Chambers, did something occur — don't say what it was — but did something occur that you left that place?
A That's right, yes.

Q 12 And did or not you later return?
A Later, yes, sir.

Q 13 Now, when you returned, did you see Detective McQuown and Mr. Cardin talking?
A Yes, sir.

Q 14 Do you know John A. Cardin?
A Sir?

Q 15 Do you know Mr. Cardin?
A Yes, sir, I do.

Q 16 Did you hear any part of that conversation?

A I was present in the latter part of it.

Q 17 And what did you hear?

A I heard John A. say that he had 20 to 25 head of Holstein cattle on his farm that didn't belong to him.

Q 18 And is that about all you heard of the conversation?

A At that time on the farm, yes, sir, that was about it.

Q 19 Now, later, were you present when anything further was said about some conversation with Mr. Cardin?

A Later, at the State Police Barracks, yes, sir.

Q 20 What, if anything, did you hear Mr. Cardin say at the State Police Barracks?

A Mr. Cardin stated that he knew where the — some more of the man's tobacco — he was referring to Mr. Parsley — that he knew where some more of the tobacco was; however, he would not tell us until the following Monday. He said he would tell us at that time.

[191]

Q 21 Now, this conversation at the Post was on Saturday, December the 12th?

A Yes, sir.

Q 22 And at that time, Mr. Cardin said he wouldn't tell you until Monday?

A Until Monday, and he said he would show it to us then.

Q 23 Now, on Monday — that would be December the 14th — did you see Mr. Cardin again?

A Yes, sir, we went to his farm.

Q 24 And on that occasion, was anything done about the cattle?

A Yes, sir.

Q 25 What was done then?

A They were loaded by Mr. Parker. Mr. Cardin had them in the barn when we got there.

Q 26 Did or not you make some pictures concerning that operation?

A I did, yes.

Q 27 Detective Chambers, those pictures have been filed as exhibits in this case, being Exhibits No. 21 through 28. I show them to you and ask you if you made those pictures?

(WITNESS EXAMINED THE PICTURES HANDED TO HIM.)

A Yes, I did.

Q 28 Will you speak out loud so the jury can hear you?

A Yes, I did.

Q 29 And is the truck shown in the picture — do you know who it belongs to?

Testimony of James Chambers

A No, sir, I don't; that was the truck the cattle was loaded onto that day. I don't know the operator of it.

[192]

Q 30 Detective Chambers, I know you can talk louder than that.

A I don't know the owner of the truck; that was the truck the cattle was loaded on that day.

Q 31 And that truck took the cattle away?

A Yes, sir, it did.

Q 32 And after that, what did you do?

A We followed Mr. Cardin over to Greensburg to a tobacco warehouse.

Q 33 You say "we." Who was that?

A Sergeant McQuown and Detective Spurrier and myself.

Q 34 What occurred when you got to Greensburg?

A We went to the tobacco warehouse and located some tobacco.

Q 35 How did you happen to go to Greensburg at that time?

A We followed Mr. Cardin in his car, and he led us there.

Q 36 Well, did he say to follow him, or what happened?

A He said that he would take us to where the tobacco was at.

Q 37 You had, then, been told to follow him?

A Yes, sir.

Q 38 And you did that?

A Yes, sir.

Q 39 Now, what were you looking for and what did you find at Greensburg?

A We found tobacco on the floor of the tobacco warehouse there.

Q 40 And did that have or not have anything to do with the Parsley tobacco?

A Mr. Cardin stated that was some more of the tobacco of Mr. Parsley's.

[193]

Q 41 Mr. Cardin told you it was?

A Yes, sir.

MR. JAMES: You may ask him.

CROSS EXAMINATION BY MR. HATCHER:

Q 42 Now, I'm referring to that tobacco at Greensburg. You say he took you over there and told you that was some of the tobacco that come out of his barn, did he?

A Yes, sir.

Q 43 In other words, he took you to the to-

bacco and pointed it out to you, and apparently wasn't making any concealment of it or anything on that occasion, is that right?

A No, sir, he took us to it.

MR. HATCHER: Okay, that's all.

THE COURT: Ladies and gentlemen, it is now ten minutes to five and there comes a limit to human endurance. You've worked hard all day, and I expect we've gone as far as we can today. So remember and observe the admonition heretofore given you, and do not discuss the case among yourselves or with anyone else — not with your husbands or your wives or your children when you go home. Don't discuss it with anyone, and do not form or express an opinion on the case until it is finally submitted to you.

Return, please, at nine o'clock in the morning.

[194]

HARDIN CIRCUIT COURT

INDICTMENT NO. 71-46

COMMONWEALTH OF KENTUCKY — PLAINTIFF

vs.

JOHN A. CARDIN — DEFENDANT

TRANSCRIPT OF EVIDENCE

THIS MATTER COMING ON FOR HEARING IN THE HARDIN CIRCUIT COURT, ELIZABETHTOWN, KENTUCKY, BEFORE THE HONORABLE J. HOWARD HOLBERT, JUDGE OF SAID COURT, AND A JURY, ON JUNE 26, 1972, AND AGAIN ON JUNE 27, 1972, AND NOT BEING CONCLUDED ON EITHER OF SAID DATES, WAS RESUMED ON JUNE 28, 1972, AS FOLLOWS:

****

APPEARANCES WERE THE SAME AS ON JUNE 26, 1972, AND JUNE 27, 1972.

****

JUNE 28, 1972

THE COURT: Are we ready to proceed, gentlemen?

Testimony of Carl Bush, Jr.

MR. HATCHER: Yes, Your Honor.

MR. JAMES: Yes, Your Honor.

THE COURT: Waive the call of the jury?

MR. JAMES: Waive the call.

MR. HATCHER: Yes, sir.

CARL BUSH, JR., CALLED AS WITNESS ON BEHALF OF THE COMMONWEALTH OF KENTUCKY, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

[195]

DIRECT EXAMINATION BY MR. JAMES:

Q 1 Is your name Carl Bush, Jr.?

A Right.

Q 2 Where do you live, Mr. Bush?

A Route 2, Elizabethtown.

Q 3 And what is your business or occupation?

A I own Edlin's Machine Shop and work at 326 East Dixie.

Q 4 And did or not you own that business in December of 1970?

A I did.

Q 5 Do you know the Defendant, John A. Cardin?

A Yes, I do.

Testimony of Carl Bush, Jr.

Q 6 Mr. Bush, in the month of December of 1970, did or not Mr. Cardin bring a truck and chassis and cab to your place of business?

A Yes, he did.

Q 7 Will you tell the jury about that — what was said and what work was to be done?

A He called me on — I believe it was Thursday, December the 10th; I'm not for sure, but I believe that's right, that morning, and asked me could I lengthen a truck and put five foot in it; and I told him yes. And he asked me what time I could get to it, and I told him about three o'clock in the afternoon. And he pulled in there at three o'clock in the afternoon and showed me what he wanted done to it, then he left, and I started work on the truck.

Q 8 Did he tell you who the truck belonged to?

A No, sir.

[196]

Q 9 Did he say anything other than that he wanted you to lengthen the frame?

A That's all.

Q 10 Now, how is that done?

A You cut the frame in two behind the cab, and you put five foot in it.

Q 11 And did you do that?

A Yes, sir.

Testimony of Carl Bush, Jr.

Q 12 Mr. Bush, I show you a picture that has been filed, marked Commonwealth Exhibit No. 17, and ask you to examine that picture and state whether or not that was made in your shop?

A It's in my shop, yes, sir.

Q 13 And is or not that the truck that Mr. Cardin brought in?

A It looks like it.

Q 14 Now, will you notice the license on the truck as shown in the picture; is that the license tag that was on it?

A I reckon it is; as far as me noticing the license, I never even notice the license on no truck.

Q 15 You just didn't notice it. Do you see the arrow on the picture, up near the cab?

A Yes, sir.

Q 16 Is that where the truck was — where the frame was cut and pieces inserted?

A Yes, sir.

Q 17 And that was done on December the 10th, 1970?

A Tenth and eleventh; it was started on the 10th, I believe, and —

[197]

Q 18 Two days?

A Yeah, we started on the evening he brought it in.

Testimony of Carl Bush, Jr.

Q 19 Now, were you present when Detective McQuown came to your place?

A Early that morning, I was.

Q 20 Did or not you see him make the pictures?

A No, I wasn't there when he made the pictures. I left at nine-thirty that morning to go to the coal mines and when he made the pictures I wasn't there.

Q 21 During the work that you did, did you have occasion to get in the cab?

A I might back in the shop, yes, sir — me or one of the boys, now I don't know which.

Q 22 Did or not you notice any license tags on the floor of the cab?

A I never noticed them.

Q 23 You didn't notice them. Did or not Mr. Cardin make any statement about his reason for changing the length of the frame?

A He said they wanted to put a certain size bed on it.

MR. JAMES: That's all. You may ask him.

CROSS EXAMINATION BY MR. HATCHER:

Q 24 Mr. Bush, did he tell you that this work was to be done for a customer of his?

A Yes, sir. Sonora Garage, and he had a customer that wanted a truck lengthened.

Q 25 He didn't say that it was his truck?
A No, sir.

* * * * *

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Q 36 Did you see the truck any more after it left your place of business?
A Yes, sir. I mounted the bed on it, and I also mounted the electric tail-gate on it.

Q 37 And who was that for?
A Mr. McQuown.

Q 38 Mr. McQuown?
A Yes, sir.

Q 39 Do you know whether he uses it any in his private business or not?
A No, sir, I don't.

Q 40 You don't know what he does with it?
A No, sir. I put the truck back to its original size.

MR. HATCHER: I believe that's all.

REDIRECT EXAMINATION BY MR. JAMES:

Q 41 You say you put it back in its original condition?

A Yes, sir.

Q 42 That is, you took that piece out lengthening it?

A Yes, sir, and put it back to its original size.

Q 43 Like it was. And the bed or body you put on there, do you know whether that was the bed or body that had been on the chassis?

A I couldn't swear to it; they told me it was. I didn't see it before; I didn't see it on the truck before.

Q 44 Now, how long after Mr. Cardin did this work that he had you do was it before you changed it back to its original condition?

[200]

A It was a right smart while. I'd say six or seven weeks, or maybe eight weeks.

Q 45 And was or not the chassis and cab at your place all during that time?

A It was stored at my place all the time.

MR. JAMES: That's all.

FORREST CHENAULT, CALLED AS WITNESS ON BEHALF OF THE COMMONWEALTH OF KENTUCKY, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY MR. JAMES:

Q 1 Would you state your name, please?

A Forrest Chenault.

Testimony of Forrest Chenault

Q 2 Mrs. Chenault, do you hold any official position in the County Clerk's Office of Hardin County, Kentucky?

A Deputy County Court Clerk.

Q 3 And is or not a part of your duties in connection with the licensing and registration of motor vehicles?

A Yes, sir.

Q 4 Were you or not occupying that position in the years 1969 and 1970?

A Yes, sir.

Q 5 I show you a Kentucky license tag with the number A73-853 and ask you if you can tell what character of license tag that is?

A It's a farm tag.

Q 6 And for what year?

A 1970.

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Q 7 As Deputy Clerk, do you have custody of the registration papers under your control?

A Yes, sir.

Q 8 I show you a registration slip for the year 1970, and ask you if that is a record of your office?

A Yes, sir.

Q 9 And what is that, Mrs. Chenault?

Testimony of Forrest Chenault

A Well, it is a 1954 Chevrolet truck licensed in 1970 with Farm Tag A73-853 to John A. Cardin, Sonora, Kentucky.

Q 10 And when was that issued?

A That was issued 12/31/69; it was also transferred 12/31/69.

Q 11 On the same date it was transferred?

A Yes, sir.

Q 12 And what was the transfer?

A From John A. Cardin, Sonora, Kentucky, to Sonora Garage, Incorporated, Sonora.

Q 13 Do you know who is the proprietor of the Sonora Garage?

A No, sir, not really.

Q 14 Was there any other transfer of that vehicle during the year 1969 or '70?

A No, sir.

Q 15 There are other papers that have to do with that vehicle registration. What are they, Mrs. Chenault?

A You mean underneath?

Q 16 Yes. What are the papers underneath?

A Well, at the time it was licensed we picked up a Larue County 1969 registration. Under "Procured From" it says "Made from junk."

Testimony of Forrest Chenault

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Q 17 And in whose name was the Larue County registration?

A John A. Cardin, Sonora, Kentucky.

Q 18 And for what period of time would that registration be?

A It would be good from April — well, it was licensed to May the 23rd, 1969, and it was good until April 1, 1970.

Q 19 That is, the registration runs beyond the first of the year?

A Truck registrations run from April to April.

Q 20 But the year 1970 is from January the 1st to December the 31st, is it not?

A Not trucks or trailers, no, sir.

Q 21 Not trucks or trailers. Mrs. Chenault, will you file the papers that you have in your hand as part of your testimony, marking them for identification Commonwealth Exhibits No. 36, 37, 38, 39, and 40, with leave of the Court to withdraw the originals which are the official copies and substitute Xerox copies?

THE COURT: Very well. We will either supply them with Xerox copies, or copy them for our file. Either way. I think copies would be sufficient.

Q 22 Will copies be sufficient for your record?

A Yes, sir. We prefer the originals. But,

Testimony of Forrest Chenault

I mean, the originals would be returned, wouldn't they, eventually?

THE COURT: Yes.

(Xerox copies of the County Court records referred to above are filed herewith and made a part hereof, marked for identification, Commonwealth Exhibits No. 36, 37, 38, 39, and 40.)

MR. JAMES: That's all. Thank you.

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CROSS EXAMINATION BY MR. HATCHER:

Q 23 Mrs. Chenault, according to your records as I understand it, this license tag that Mr. James exhibited to you would have belonged to the Sonora Garage after it was transferred in December of 1970, would it?

A Well, it was licensed to Mr. Cardin and then transferred the same day to the Sonora Garage.

Q 24 Yeah. The truck was originally licensed in Mr. Cardin's name, as I understand, in 1969?

A Yes, in Larue County.

Q 25 Yeah. Then, on December the 31st, 1969, the car or truck, whichever one it was, was registered in Mr. Cardin's name and then transferred to the Sonora Garage?

A It was re-registered in his name and transferred to the Sonora Garage.

Testimony of Forrest Chenault

Q 26 So then, after December the 31st, 1969, according to your records, that tag would have belonged to the Sonora Garage, is that right?

A Yes, sir.

MR. HATCHER: That's all.

MR. JAMES: Your Honor, we would like to exhibit these papers to the jury.

THE COURT: Very well.

COMMONWEALTH EXHIBITS NO. 36, 37, 38, 39 AND 40 WERE EXHIBITED TO THE JURY.

IMOGENE BUSH, CALLED AS WITNESS ON BEHALF OF THE COMMONWEALTH OF KENTUCKY, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

[204]

DIRECT EXAMINATION BY MR. JAMES:

Q 1 Is your name Imogene Bush?

A Yes, sir.

Q 2 Mrs. Bush, do you hold any official position in the office of the Clerk of the Hardin County Court?

A Yes, sir, I'm a deputy clerk.

Q 3 As such, do you or not have custody of

the records pertaining to corporations formed in Hardin County?

A Yes, sir.

Q 4 Do you have with you the records of such — the formation of such corporations?

A Yes, sir.

Q 5 What is the book you have?

A I have Articles of Incorporation Book No. 5.

Q 6 Now, on Page 291 is there or not a record pertaining to the Sonora Garage, Inc.?

A Yes, sir.

Q 7 Is that the articles of incorporation of that company?

A There is an articles of incorporation of the Sonora Garage, Incorporated.

Q 8 Now, Mrs. Bush, will you please read to the jury the articles?

A (Reading) Articles of Incorporation of Sonora Garage, Incorporated. Know all men by these presents that I, the undersigned, do hereby present these articles for the purpose of forming a corporation under the laws of the State of Kentucky. Article I: The corporation hereby proposed to be organized shall be named and known as Sonora Garage, Incorporated, by which name it may [205] contract and be contracted with, sue and be sued, adopt a corporate

seal, and do all things necessary to the conduct of its business in the furtherance of the express purpose.

MR. HATCHER: Your Honor, will you excuse me just a minute. In order to save time, rather than to read all of that, I think we can probably stipulate whatever it is that Mr. James is undertaking to prove here.

COURT AND COUNSEL CONFERRED OFF THE RECORD IN THE PRESENCE OF BUT OUT OF THE HEARING OF THE JURY.

Q 9 Now, Mrs. Bush, do the Articles of Incorporation show who the incorporator is?

A Do you mean referred to as the person signing it?

Q 9 Is there a paragraph with the name of the incorporator?

A Yes, sir. Article VIII: (Reading) The name and address of the incorporator and the number of shares subscribed by him is as follows: Mr. John A. Cardin, Post Office Box 27, Sonora, Kentucky, 42776, one hundred shares.

Q 10 Now, is there a paragraph that shows the amount of authorized capital stock for the corporation?

A Article VII: (Reading) The amount of capital with which the corporation will begin business shall be five thousand dollars.

Testimony of Imogene Bush

Q 11 Previous to that, is there one on the capital stock — the amount of capital stock and number of shares?

A Mr. James, I have not read this in its entirety, so I'm — (WITNESS EXAMINES RECORD.)

MR. HATCHER: Your Honor, I can't see that the authorized number [206] of shares of capital stock would have any bearing on the case one way or the other.

MR. JAMES: Ownership is all, Mr. Hatcher.

MR. HATCHER: Well, authorized shares doesn't show any ownership. Shares of the agent can, and she testified about that — John A. Cardin. But authorized don't show any ownership at all.

WITNESS: In Article V it relates to the total number of shares of stock.

MR. JAMES: That's what I want.

THE COURT: I think the articles are competent for what they show.

Q 12 Read Article V, please.

A (Reading) Article V: The total number of shares of stock authorized to be issued shall be one hundred shares of no par value stock. The voting power of said stock shall be equal and shall be one vote per share.

Testimony of Imogene Bush

Q 13 That's enough, Mrs. Bush. Now, who signed the articles of incorporation?

A The articles were signed, John A. Cardin.

Q 14 And what is the date recorded?

A In our office?

Q 15 Yes.

A All right. The certificate shows that they were recorded the 17th day of October, 1967.

Q 16 Now, is there any record of any dissolution of that corporation?

A I did not find any.

Q 17 Are there any amendments to the articles?

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A No, sir.

MR. JAMES: You may ask her, Mr. Hatcher.

MR. HATCHER: I have no questions.

MR. JAMES: Your Honor, that is the case for the Commonwealth.

MR. HATCHER: We have some motions to file, Your Honor.

WHEREUPON THE COURT ANNOUNCED THAT THERE WERE MATTERS TO TAKE UP IN CHAMBERS, ADMONISHED THE JURY, AND ALLOWED THEM A RECESS. THE FOL-

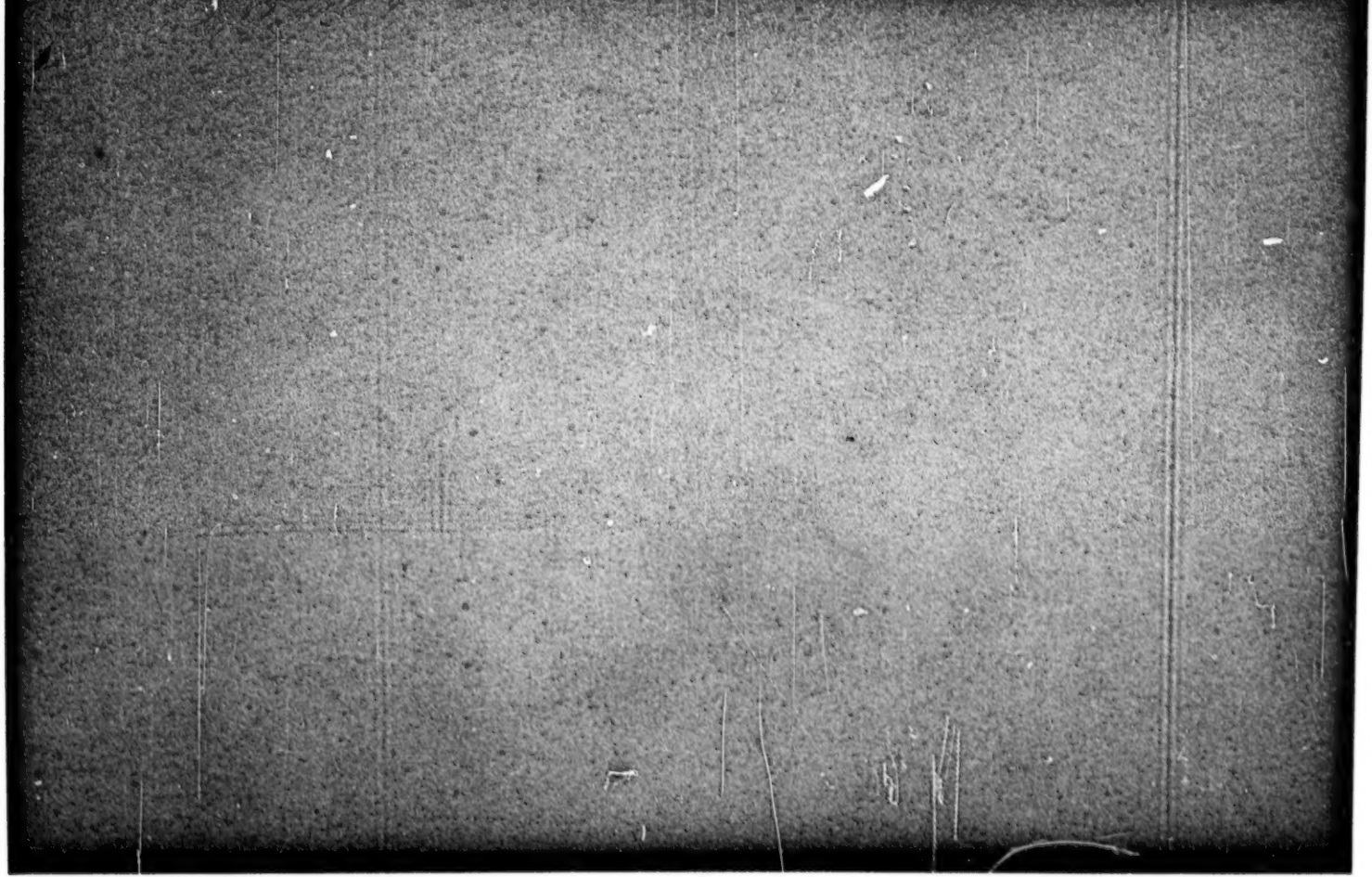
Testimony of Imogene Bush

LOWING PROCEEDINGS WERE HAD OUT OF THE HEARING OF THE JURY:

MR. HATCHER: Your Honor, the Commonwealth having introduced its proof and rested, and at the conclusion of all the proof introduced by the Commonwealth, comes the Defendant and moves the Court to direct the jury to return a verdict of not guilty because the evidence introduced by the Commonwealth, with all reasonable inferences to be drawn therefrom, is not sufficient to prove all of the elements or offenses for which the Defendant is charged and for which he is being tried; and for that reason, the Defendant is entitled to a directed verdict for acquittal at this time and moves the Court to so order same on each of the four counts of the indictment for which the Defendant is being tried.

MR. JAMES: To which motion, the Commonwealth objects, and submits that it is a jury question and that the evidence standing unexplained is sufficient for a jury to decide.

THE COURT: I feel at this time that a jury question does exist,



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MICHAEL RODAK, JR. CLERK

Supreme Court Of The United States

OCTOBER TERM, 1973

No. 74-1

JOHN A. CARDIN, PETITIONER

versus

COMMONWEALTH OF KENTUCKY, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

PETITION FOR REHEARING

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Supreme Court Of The United States

OCTOBER TERM, 1973

No. 74-1

JOHN A. CARDIN, *Petitioner*

versus

COMMONWEALTH OF KENTUCKY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

PETITION FOR REHEARING

I

THE ENTRY OF TESTIMONY CONCERNING OTHER CRIMES COMMITTED BY THE PETITIONER WAS A VIOLATION OF HIS RIGHT TO CONFRONTATION.

The Sixth Amendment guarantee of the Right to Confrontation of witnesses is a fundamental right applied to the states through the Fourteenth Amendment. *Pointer* v. *Texas,* 385 U.S. 400 (1965). In that case the Court held that the record of the pretrial hearing could not be used in the trial if there was not adequate opportunity for cross-examination of the witnesses at that hearing. The rationale for the ruling was that such cross-examination was necessary to the rudiments of a fair trial. The Court noted that this Right to Confrontation was *not* met just because an attorney was given a mere opportunity to cross-examine:

> "The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given *a complete and adequate opportunity to cross-examine.*" 380 U.S. at p. 407 (Emphasis added)

In the case here the petitioner was, of course, represented by counsel. However, counsel was deprived of that "complete and adequate" opportunity to cross-examine the witnesses that the *Pointer* decision requires.

On three separate occasions statements relating to other crimes allegedly committed by the petitioner were made from the witness stand by the chief prosecuting witness. Although petitioner continuously objected to such testimony, it was nonetheless allowed to stand without even an admonition to the jury. Petitioner's counsel obviously couldn't ask questions in cross-examination pertaining to those matters, therefore effectively depriving the petitioner the ability to completely and adequately cross-examine the witness.

This evidence of other crimes was not separately admissable as a matter of law, yet the jury was allowed to consider such evidence without even an admonition. Even with an admonition it would have been extremely difficult for the jury to overlook this testimony in considering their verdict. As Justice Frankfurter stated in dissent in *Delli Paoli* v. *United States*, 352 U.S. 232 (1957):

> "The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should

not consider but which they cannot put out of their minds." 352 U.S. at p. 24.

This dissent was later cited with approval in the landmark decision of *Jackson* v. *Denno*, 378 U.S. 368 (1964).

In another case, the Court has condemned restrictions on the scope of cross-examination. In *Smith* v. *Illinois*, 390 U.S. 129 (1968), the defendant's counsel was not allowed to ask the prosecution's chief witness on cross-examination his correct name and address. The Court found this restriction on the defendant's ability to cross-examine reversible error.

In the instant case, the jury heard evidence relating to two other crimes from the key prosecution witness. Such evidence was referred to on three separate occasions in front of the jury. It is petitioner's contention that the inability, indeed the impossibility, of counsel on cross-examination to completely and adequately confront this witness was a violation of his Sixth Amendment rights. Under *Pointer*, the fact of confrontation must be coupled with the reality of confrontation in order for cross-examination to be complete and adequate under the Sixth Amendment. Such was not the case here.

II

THE FAILURE OF THE TRIAL JUDGE TO GRANT THE PETITIONER'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF THE RESPONDENT'S CASE SHIFTED THE BURDEN OF PROOF TO THE PETITIONER IN VIOLATION OF HIS PRESUMPTION OF INNOCENCE.

The petitioner was charged in one count of the indictment with knowingly receiving stolen property in

the form of a 1970 Chevrolet truck. In order for the respondent to sustain the charge, it was necessary that it be shown that the truck was, in fact, stolen at the time petitioner received it. The evidence on this point presented by the respondent consisted of, at best, a circumstantial inference that it was stolen or the subject of a larceny at the time petitioner received it. The respondent presented evidence that petitioner was attempting to alter the body of the truck. The rental agreement covering the truck with a third party was also referred to though not entered into evidence. This agreement showed that the truck was legally in possession of a third party at the time petitioner was arrested. There had been no report filed by the rental agency concerning this vehicle being stolen.

Thus, the respondent was able to assert the stolen nature of the vehicle merely by having the jury assume that petitioner's possession of it had to have been the result of larcenous activity by either him or the third party lessee. Under Kentucky law, there is a rebuttable presumption that one in possession of stolen goods knew they were stolen. The situation here is one step short of this presumption since the respondent asked the jury to assume first of all that the automobile was stolen in order to put into effect the presumption itself. Such a tactic shifted the burden of proof to the petitioner to prove that the vehicle was *not* stolen: to have required the petitioner to shoulder this burden of proof in addition to rebutting the ensuing legal presumption detracted from his constitutional presumption of innocence that was petitioner's throughout the trial.

The Kentucky Court of Appeals acknowledged explicitly the inferential basis used by the respondent to

establish an essential element of the offense when considering this case on appeal. The Court then contradicted itself by asserting that the evidence supported the verdict. Such evidence supports the verdict only if one assumes that the inference, which was purely circumstantial, was itself valid. The validity of the inference is not at issue here; rather, it is the tactical and strategical effect of the use of evidence creating a mere inference that is contested. Tactically, it forced the petitioner to prove that the vehicle was not stolen—a burden obviously more difficult to sustain than disproving that it was stolen. Strategically, it detracted from the presumption of innocence of petitioner that attached to each element of the crime.

The failure of the trial judge to direct a verdict at the close of the respondent's case thus required the petitioner to assume the burden of proof in refuting an essential element of the offense. It is clear that the burden of proof always rests with the prosecution in a criminal case, and this Court has viewed attempts to shift this burden with disfavor. In *Cool* v. *United States*, 409 U.S. 100 (1972), this Court held that the use of an instruction relating to reliability of an accomplice's testimony was erroneous. This was so because it ". . . had the effect of *substantially reducing* the Government's burden of proof." 409 U.S. at p. 104 (Emphasis added). The Court condemned this as detracting from the presumption of innocence:

> "Indeed, where, as here, the defendant's case rests almost entirely on accomplice testimony, the effect of the judge's instructions is to require the defendant to establish his *innocence* beyond a reasonable doubt."

> "Because such a requirement is plainly inconsistent with the constitutionally rooted presumption of innocence, the conviction must be reversed and remanded . . ." 409 U.S. at p. 104.

In the case here, the failure to sustain the motion for a directed verdict clearly substantially reduced the respondent's burden of proof. The effect of this reduction was obviously to require the petitioner to establish his innocence rather than disprove his guilt. In such a situation the petitioner respectfully contends that his due process right to a fair trial was denied.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate the order, grant the petition and review the judgment and opinion below.

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Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

FRANK E. HADDAD, JR.